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REPORTS

OF

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

AT THE

JUNE TERM, 1871.

BY THOMAS G. JONES, *State Reporter.*

VOL. XLVI.

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OFFICERS OF THE COURT,

DURING THE TIME OF THESE DECISIONS.

E. WOLSEY PECK, CHIEF-JUSTICE,
Tuskaloosa, Ala.

THOMAS M. PETERS, ASSOCIATE JUSTICE,
Moulton, Ala.

BENJAMIN F. SAFFOLD, ASSOCIATE JUSTICE,
Selma, Ala.

JOHN W. A. SANFORD, ATTORNEY-GENERAL,
Montgomery, Ala.

DANIEL B. BOOTH, CLERK,
Montgomery, Ala.

PATRICK RAGLAND, MARSHAL,
Bellefonte, Ala.

TABLE OF CASES.

Adkinson v. Wright.....	598	City of Selma v. Mullen.....	411
Ala. & Fla. R. R. Co. v. Burkett..	569	City of Tusculumbia v. Lindsay.	581
Ala. Medical College v. Muldon		Clark ats. Moses.....	229
& Sons.....	603	Clark v. The State.....	307
Armistead v. Irvine.....	363	Clement v. Nelson.....	634
Atkins v. Knight.....	539	Cockran v. The State.....	714
Autry v. Walters.....	476	Cogburn v. McQueen.....	551
Barker v. Bell.....	216	Colby ats. First National Bank	
Barwick v. Rackley.....	402	of Selma.....	435
Bates v. Mayor and Aldermen		Cole & Sons ats. Stewart & Hud-	
of Mobile.....	158	son.....	646
Bell ats. Barker.....	216	Conn v. Thornton.....	587
Benton v. Taylor.....	388	Costley v. Towles.....	660
Bibb ats. Ryan.....	323	Crawford v. Tyson.....	299
Bibb ats. Vaughan and Wife..	153	Creswell ats. Hall.....	460
Bibb and Wife ats. Carpenter..	584	Crommelin's Adm'r ats. Wald-	
Bledsoe ats. Thornton.....	73	man.....	580
Block v. McNeil.....	288	Crumbley v. Searcey.....	328
Boggs ats. Hawkins.....	15	Cunningham ats. Wharton....	590
Boles v. The State.....	204	Curtis v. Gaines.....	455
Bottoms, <i>Ex parte</i>	312	Dale County v. Gunter.....	118
Boyd & Jackson v. The State..	329	Darnell v. Griffin.....	520
Boynton v. Nelson.....	501	Davis v. The State.....	80
Bradley v. Graves.....	277	Dempsey, Harrell & Co. v. Sta-	
Brame v. McGee.....	170	pleton.....	383
Brazelton ats. Hall & Curry..	359	Dillihunt ats. Eslava.....	698
Brigman v. The State.....	72	Dinkins ats. Jackson.....	69
Britt's Legatees v. Petty.....	491	Dudley v. Witter.....	664
Brown v. The State.....	148, 175	Dugger v. Tayloe.....	320
Bryant v. The State.....	302	Dunkin v. Hodge.....	523
Burkett ats. Alabama & Florida		Durr ats. Rivers.....	418
Railroad Company.....	569	Echols ats. Stringer.....	61
Burnett & Martin v. Eufaula		Edwards ats. Mobile & Girard	
Home Insurance Co.....	11	Railroad Co.....	267
Burns ats. Shropshire.....	108	Edwards ats. Webb.....	17
Cabbell v. The State.....	195	Edwards & Brassell ats. Mea-	
Campbell ats. Ingersoll.....	282	dows.....	354
Campbell ats. Pizzala.....	35	Eslava v. Dillihunt.....	698
Campbell v. The State.....	116	Eufaula Home Insurance Co.	
Carpenter ats. Bibb and Wife.	584	ats. Burnett & Martin.....	11

Evins v. The State.....	88	Jones v. Trustees Florence Wesleyan University	626
<i>Ex parte</i> Bottoms	312	Jones & Cullom v. Knox	53
<i>Ex parte</i> Locke.....	77	Kennedy v. Marrast.....	161
<i>Ex parte</i> Selma & Gulf Railroad Co.	230, 423	Knight ats. Atkins	539
<i>Ex parte</i> Thornton.....	384	Knox ats. Jones & Cullom....	53
Falconer v. Robinson.....	340	Kyle ats. Thornton.....	379
Faulks ats. McSwean.....	610	Lane and Wife v. Mickle.....	600
Fielder & Sessions ats. Simmons.....	304	Latham v. Staples.....	462
First National Bank of Selma v. Colby.....	435	Lehman Brothers v. Skelton..	310
Fisher v. The State.....	717	Lillensteine v. The State.....	498
Flagg ats. Smith.....	624	Lindsay ats. Shaw.....	290
Flanagan v. The State.....	703	Lindsay ats. City of Tuscumbia.	581
Fulgham v. The State....	143	Locke, <i>Ex parte</i>	77
Gaines ats. Curtis.....	455	Logan v. Mobile Trading Co..	514
Gardner v. Pickett.....	191	Malone ats. Mobile & Ohio Railroad Co.....	391
Gazzam ats. Stone & Matthews.	269	Marrast ats. Kennedy.....	161
Grady v. Wolsner.....	381	Marshall ats. Howell.....	318
Graves ats. Bradley.....	277	Maynard v. The State.....	85
Gregory v. The State.....	151	Mayor and Aldermen of Mobile ats. Bates.....	158
Griffin ats. Darnell.....	520	McCullough v. Talladega Insurance Co....	376
Guice ats. Parker.....	616	McGee ats. Brame.....	170
Gunter ats. Dale County	118	McInnish ats. Taunton & Brooks	619
Hall v. Creswell.....	460	McNeil ats. Block.....	288
Hall & Curry v. Brazelton....	359	McPeters v. Phillips.....	496
Harrison v. Holley.....	84	McQuaid v. Powers and O'Donnell.....	44
Hart v. Shorter & Baker.....	453	McQueen ats. Cogburn.....	551
Hawkins v. Boggs.....	15	McSwean v. Faulks.....	610
Henry v. Porter.....	293	Meadows v. Edwards & Brassell.	354
Hetherington v. Hixon.....	297	Medical College (Alabama) v. Muldon & Sons.....	603
Hightower v. Moore.....	387	Merrill v. The State.....	82
Hightower and Wife v. Moore.	466	Mickle ats. Lane and Wife....	600
Hixon ats. Hetherington.....	297	Mobile Trading Co. ats. Logan.	514
Hodge ats. Dunkin.....	523	Moody v. Robertson.....	432
Holley ats. Harrison.....	84	Moore ats. Hightower.....	387
Howell ats. Marshall.....	318	Moore ats. Hightower and Wife.	466
Hudgins v. The State.....	208	Moseley ats. Whitley.....	480
Hudspeth v. Thomason.....	470	Moses v. Clark.....	229
Hutchins ats. Randolph County	397	Muldon & Sons ats. Alabama Medical College.....	603
Ingersoll v. Campbell.....	282	Mullen ats. City of Selma....	411
Insurance Co. (Eufaula Home,) ats. Burnett & Martin.....	11	Murrell v. The State.....	89
Insurance Co. (Talladega,) ats. McCullough	376	National Bank of Selma (First) v. Colby.....	435
Irvine v. Armistead.....	363	Nelson ats. Boynton.....	501
Jackson v. Dinkins.....	69		
Jernigan ats. Oliver	41		
Johnson v. The State.....	212		

Nelson ats. Clement.....	634	Shropshire v. Burns.....	108
Nelson v. The State.....	186	Simmons v. Fielder & Sessions.	304
Oliver v. Jernigan.....	41	Skelton ats. Lehman Brothers.	310
Orme ats. Scruggs and Lindsay.	533	Slocovitch v. The State.....	227
Overstreet v. The State.....	30	Smith v. Flagg ..	624
Oxford Iron Co. v. Spradley...	98	Snedecor ats. Wright and Wife,	92
Parker ats. Guice.....	616	Spradley ats. Oxford Iron Co..	98
Patrick Irwin & Co. ats. Prest- ridge.....	653	Staples ats. Latham.....	462
Perkins ats. Turrentine.....	631	Stapleton ats. Dempsey, Har- rell & Co.....	383
Petty v. Britt's Legatees.....	491	State ats. Boles.....	204
Phillips ats. McPeters.....	496	State ats. Boyd & Jackson....	329
Pickett ats. Gardner.....	191	State ats. Brigman.....	72
Pizzala v. Campbell.....	35	State ats. Brown.....	148, 175
Pleasants ats. Western Union Telegraph Co.....	641	State ats. Bryant.....	302
Porter ats. Henry.....	293	State ats. Cabbell.....	195
Powers and O'Donnell ats. Mc- Quaid.....	44	State ats. Campbell.....	116
Prestridge v. Patrick Irwin & Co.	653	State ats. Clark.....	307
Prewitt ats. Mobile & Girard Railroad Co.....	63	State ats. Cochran.....	714
Rackley ats. Barwick.....	402	State ats. Davis.....	80
Railroad Co. (Ala. & Fla.) v. Burkett.....	569	State ats. Evins....	88
Railroad Co. (Mobile & Girard) v. Edwards.....	267	State ats. Fisher.....	717
Railroad Co. (Mobile & Girard) v. Prewitt.....	63	State ats. Flanagan.....	703
Railroad Co. (Mobile & Ohio) v. Malone.....	391	State ats. Fulgham.....	143
✓ Railroad Co. (Selma & Gulf) <i>Ex parte</i>	230, 423	State ats. Gregory.....	151
Randolph County v. Hutchins.	397	State ats. Hudgins.....	208
Ray ats. Thompson.....	224	State ats. Johnson.....	212
Reynolds ats. Wilcoxon.....	529	State ats. Lillensteine.....	498
Rivers v. Durr.....	418	State ats. Maynard.....	85
Rivers v. Thompson.....	335	State ats. Merrill.....	82
Robertson ats. Moody.....	432	State ats. Murrell.....	89
Robertson, Brown & Co. ats. Voss & Co.....	483	State ats. Nelson.....	186
Robinson ats. Falconer.....	340	State ats. Overstreet.....	30
Robinson v. The State.....	9	State ats. Robinson.....	9
Ryan v. Bibb.....	323	State ats. Slocovitch.....	227
Scruggs & Lindsay v. Orme...	533	State ats. Warren.....	549
Searcey ats. Crumbley.....	328	Stewart & Hudson v. Cole & Son	646
Selma (City of) v. Mullen....	411	Stone & Matthews v. Gazzam..	269
Shaw v. Lindsay.....	290	Stott ats. Wright.....	200
Shorter & Baker ats. Hart....	453	Stringer v. Echols.....	61
		Swanson ats. Wright.....	708
		Talladega Insurance Co. v. Mc- Cullough.....	376
		Taunton & Brooks v. McInnish,	619
		Tayloe ats. Dugger.....	320
		Taylor ats. Benton.....	388
		Telegraph Co. (Western Union) v. Pleasants.....	641
		Thomason ats. Hudspeth.....	470
		Thompson v. Ray.....	224

Thompson ats. Rivers.....	335	Waldman v. Crommelin's Adm'r	580
Thornton v. Bledsoe.....	73	Walters ats. Autry	476
Thornton ats. Conn	587	Warren v. The State.....	549
Thornton, <i>Ex parte</i>	384	Webb v. Edwards.....	17
Thornton v. Kyle.....	379	Western Union Telegraph Co.	
Towles ats. Costley	660	v. Pleasants.....	641
Turrentine v. Perkins.....	631	Wharton v. Cunningham.....	590
Tuscumbia (City of) v. Lind-		Whitley v. Moseley	480
say.....	581	Wilcoxon v. Reynolds.....	529
Trustees Florence Wesleyan		Witter ats. Dudley.....	664
University ats. Jones.....	626	Wolsner ats. Grady.....	381
University (Trustees Florence		Wright ats. Adkinson.....	598
Wesleyan) ats. Jones.....	626	Wright v. Stott.....	200
Vaughan and Wife v. Bibb....	153	Wright v. Swanson.....	708
Voss & Co. ats. Robertson,		Wright and Wife v. Snedecor..	92
Brown & Co.....	483		

REPORTS
OF
CASES ARGUED AND DETERMINED
AT THE JUNE TERM, 1871.

ROBINSON vs. THE STATE.

[INDICTMENT FOR MURDER.]

1. *Indictment and list of jurors ; when judgment will not be reversed for failure to show service of copy of, on defendant.*—The judgment and sentence in a capital case will not be reversed because the record and proceedings do not show that the defendant was served with a copy of the indictment and a list of the jurors summoned for his trial, including the regular jury, at least one entire day before the day appointed for his trial, unless it appears from the record that the defendant was in actual confinement.
2. *Accused, duty of ; as to errors relied on to reverse judgment below.*—Although under our statutes no assignment of error is necessary in a criminal case; nevertheless, the accused should, in some proper manner, bring to the notice of the court the matters relied on to reverse the judgment below.

APPEAL from City Court of Mobile.

Tried before Hon. C. F. MOULTON.

This appeal was taken on the record from a conviction of murder in the second degree in the lower court. No counsel appears for appellant, and no errors are assigned. The opinion states the points on which the case turns.

PECK, C. J.—The appellant was indicted in the city court of Mobile for murder.

She was tried and convicted of murder in the second

degree, and sentenced to be confined in the penitentiary for ten years.

She appeals to this court to have the proceedings and sentence of the said city court reviewed.

No brief or memorandum has been furnished to this court, pointing out or calling our attention to any particular error in the record.

In such a case, no assignment of errors is necessary. It is made the duty of this court to examine the record, and render such judgment on the record as the law demands. Revised Code, § 4314.

We think, however, the accused should furnish the court with a brief, or in some way call the attention of the court to the supposed error or errors in the record. It would save us much trouble, in otherwise having to examine the record, without any aid, to see whether any error or errors were committed in the proceedings to the injury of the accused.

We have examined the record, but find no error for which the sentence and judgment of the court below should be reversed.

We presume that the supposed error, for which this appeal was taken, is that the record does not show that a list of the jurors summoned for her trial, including the regular jury, and a copy of the indictment, were delivered to her at least one entire day before the day appointed for trial. But a sufficient answer to this is, that the record does not show that she was *in actual confinement*.—Rev. Code, § 4171.

As the record no where shows that she was *in actual confinement*, we can not, for the purpose of reversing the judgment, presume that she was. If any presumption is permissible, in such a case, it should be in favor of the regularity and correctness of the proceedings of the court below.

Let the sentence and judgment of the court be affirmed, and the clerk will certify the fact to the court below, that the sentence of said court may be carried into execution.

BURNETT & MARTIN *vs.* EUFAULA HOME INSURANCE COMPANY.

[ACTION ON FIRE POLICY OF INSURANCE.]

1. *Insurance, policy of, issued to partnership; what not vitiated by.*—A policy of insurance on a stock of goods, issued to a partnership, is not vitiated by a transfer by one partner of all his interest to his copartners, notwithstanding a provision in the contract that the policy shall be void if the property should “be sold or conveyed, or the interest of the parties therein changed.”
2. *Same; conditions for disabilities in, how construed.*—Conditions for disabilities and forfeitures, where the intent is doubtful, are to be construed against those for whose benefit they were imposed.

APPEAL from Circuit Court of Barbour.

Tried before Hon. J. McCaleb Wiley.

It appeared from the complaint, that the plaintiffs, Burnett & Martin, as partners, were seeking to recover damages upon a policy of insurance issued by the defendant to Burnett, Martin & Swan, on their stock of goods and merchandise. It was averred that prior to the loss, Swan retired from the firm, and sold all of his interest to his said copartners. The policy, which was set out in the complaint, amongst other restrictions of liability, contained the following provision: “Provided further, if the said property shall be sold or conveyed, or the interest of the parties therein changed, or, if this policy shall be assigned without the consent of the company obtained in writing hereon, then, and in every such case, this policy shall be null and void.” A demurrer to the complaint, on the ground that the transfer by Swan of his interest to his copartners was such a sale or conveyance, or change of the interest of the parties, as vitiates the contract, was sustained. The plaintiffs appeal from a judgment of nonsuit which they were compelled to take on account of this ruling.

PUGH, AND GOLDTHWAITE, RICE & SEMPLE, for appellants. Does the condition in this policy cover the sale by Swan to his copartners, (the appellants,) recited in the record?

The plain sense of the contract of insurance, the manifest logic of the law, and the highest authority, establish the proposition that such a change of interest is not prohibited by the terms of the policy.—*Wilson v. Genesee Mut. Ins. Co.*, 16 Barb. 511; *Hoffman & Place v. Aetna Fire Ins. Co.* These two cases are unanswerable in reason and sound policy.

There is a marked difference between a policy covering merchandise and policies covering other property. There is a case in 40 Pennsylvania, (*West Br. Ins. Co. v. Helfenstein*, p. 289,) which recognizes this distinction. See head-note in Digest of Decisions on Insurance, p. 70, § 53.

One of the cases relied on by appellee is from Pennsylvania, and it is on insurance of *houses* which belonged to joint owners, and this case is expressly excepted in the case in 40 Pennsylvania, because of the difference stated between *mercantile* and other policies.

All the cases which deny the right of one partner to sell to another are founded in ignorance of the true nature of partnerships, as ably expounded in Parsons on Partnership, 1 vol., pp. 2, 171. He assimilates a partnership to a corporation, and calls it a "mercantile personality," the *identity* of which is not disturbed by the retiring of one partner, or the sale by one partner to another. Parsons demonstrates the soundness of the New York decisions we have cited.

What mischiefs were the words "change of interest therein" intended to remedy? It is said that they were intended to prohibit the mischief or hazard of allowing one partner to sell to another, or increase the amount of his interest; that the company trusted one of many partners on account of his prudence, habits, &c., against the others, who might be rash, unsafe, &c., and that if these be not the mischiefs guarded against, the words have no meaning, no field to act in, &c. If change of interest by sale of the *safe* partner's share produces this mischief, the

the death of the prudent partner would produce the same effect; and so would his *involuntary* bankruptcy, as in each event a change of interest would take place.

The prohibition in the policy against sales or "any change in the interest of the parties," is aimed at any change that introduces a *stranger*, and not a change that the *parties insured* make by sales or contracts among themselves. If the prohibition forbids a sale by one to another partner because it is a change of interest, then an involuntary bankruptcy, which introduces the assignee, would avoid a policy; or a partner who owned a fourth could not increase it to a third, without vacating the policy; or if one partner died, the same result would follow.

All the decisions cited against the right of one partner to sell to another, are based on its being an increase of the *hazard*, and not on any peculiar wording of the policy. If the policy in the present case had only used the words "sell or convey," the same decisions would have been made; so that the addition of the words "change of interest therein," in the policy sued on in this case, can claim no more support from those northwestern decisions than if such words had never been added.

F. M. WOOD, for the appellee, cited the following authorities in support of the oral argument made at the bar: *Keeler v. Niagara Ins. Co.*, 16 Wis. 523; *Barnes v. Union Fire Ins. Co.*, 51 Maine, 110; *Findley v. Lycoming Ins. Co.*, 30 Penn. 311; *Hartford Ins. Co. v. Ross*, 23 Ind. 179; *Buckley v. Garrett*, 47 Penn. 204. He contended these cases are directly in point, and that the decisions are conclusive in favor of the appellee.

B. F. SAFFOLD, J.—The field of inquiry is much narrowed by the definite settlement, long since, of some material propositions independent of the special contract of these parties. Policies of insurance, except marine, are not in their nature assignable; nor is the interest in them ever intended to be transferable from one to another, without the express consent of the office.—3 Brown's Parl.

Cases, 497. It is necessary the party insured should have an interest or property at the time of insuring, and at the time the fire happens.—*Saddler's Co. v. Babcock et al.*, 2 Atkins, 554; Angell on Fire and Life Ins. §§ 55, 193.

The principle sustaining these adjudications is, that there is a purely personal contract by which the insurer undertakes a conditional indemnity of the insured alone, dependent upon certain duties to be performed by him into which enter his personal character and fitness. The property insured does not draw with it the contract, because its probable destruction is the foundation of the agreement. The essence of the contract is taken away by the transfer of the proprietary interests to others not parties to it.

It is manifest, however, that some limitation must be imposed on the restriction respecting the change of interest of the parties. Of all the ways by which some change of interest might be effected without the consent or fault of the partners, or a majority of them, some one might almost surely be expected to intervene. By the death of his partners the sole survivor would become the legal, and, in some cases, the equitable owner of all the assets. By the voluntary assignment by one partner of all his right, title and interest in the partnership property, the interests would be materially changed. If such occurrences were intended to work an entire forfeiture of the policy, the contract would be a mere wager, with all the chances on one side.

Inasmuch as the words of this restriction can not be used in their enlarged sense, and their import is doubtful, their construction must incline against those for whose benefit the restriction was imposed. The interest of each partner in the goods was *per my et per tout*. The confidence reposed in them was testified only by the issue of the policy, and consequently was equal in each. The comingling of such an interest with such a confidence ought, by the rule above stated, to determine the construction in favor of the plaintiffs. Does this restriction, then, mean nothing? I do not know what the parties intended by it.

Hawkins v. Boggs.

It is evident that the plaintiffs did not understand it in the same sense as the defendants. As it is susceptible of a meaning more extensive than was contemplated by either, it must be restrained to a reasonable significance consistent with the rights of the promisees.—*Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; *Wilson v. Genesee Mut. Ins. Co.*, 16 Barb. 511. The authorities referred to are directly in point on the facts of this case as averred in the complaint. The demurrer ought to have been overruled.

The judgment is reversed and the cause remanded.

HAWKINS vs. BOGGS.

[ASSUMPSIT FOR MONEY PAID BY MISTAKE.]

1. *What contracts not void as against public policy.*—In March, 1864, after the capture of Memphis by the United States forces and the retreat of the rebel army from Corinth, which events occurred in 1863, the insurrectionary forces did not hold such control over the citizens of the county of Lauderdale in this State, as to render contracts, between citizens of said county and citizens of Kentucky, for necessities for the family or plantation, void, as against the public policy of the United States.

APPEAL from the Circuit Court of Lauderdale county.
Tried before Hon. W. L. WHITLOCK.

The facts appear in the opinion.

E. A. O'NEAL, for appellant.

R. O. PICKETT, *contra*.

(No briefs came to the Reporter's hands.)

PETERS, J.—This is an action of assumpsit for money paid by mistake. There was a verdict and judgment for the appellee, Boggs, in the court below, for the sum of six hundred and fifty-two dollars and sixty-three cents, and

costs. From this judgment the appellant brings the case to this court by appeal, and here assigns for error the refusal of the court below to give the charges asked by the defendant in the court below.

From the bill of exceptions, it appears that the transaction out of which this suit arose, occurred in March, 1864. Mrs. Hawkins, a resident citizen of Lauderdale county in this State, sold two bales of cotton to Cherry & Co., who were resident citizens of Paducah in the State of Kentucky, and received in payment therefor a quantity of family supplies and some money in "greenbacks," or United States currency. In the transaction of the sale of the cotton Boggs was the agent of the firm of Cherry & Co. Boggs was also a citizen of Lauderdale county in this State. Mrs. Hawkins received payment for the cotton twice; once from Cherry & Co., and then again from Boggs, not knowing at the time that she had already been paid. When the mistake was discovered, she refused to pay Boggs the money he had advanced, and he brought this suit to recover it, as money paid by mistake. The court was asked by the defendant to charge, that such a contract was void, as being opposed to the public policy. This the court refused, and the defendant below excepted.

It is a fact judicially known to this court, that in March, 1864, the county of Lauderdale in this State, was not a part of the enemy's country. After the retreat of the insurrectionary forces from Corinth in the State of Mississippi, and the capture of Memphis in the State of Tennessee, in 1863, the rebel authorities had only a predatory control in the counties of the State north of the Tennessee river. Such a control was not sufficient to impress upon the people of that portion of the State the disabilities of an actual insurrection. Neither the laws of war nor the public policy of the nation then forbid a contract between a citizen of Lauderdale county in this State, and citizens of the State of Kentucky, for family or plantation supplies, particularly when such trade was allowed under a military permit of the military authorities of the United States in the actual command of the territory in which the transac-

tion took place. There was no proof that Mrs. Hawkins was an alien enemy to the nation in fact; and the learned judge of the circuit court did not err in refusing to put her in that attitude without strong proof. Under the facts shown in this case, it was by no means a sufficient presumption of law that she was an alien enemy.

The action of the court below was without error. The judgment of the circuit court is therefore affirmed.

WEBB vs. EDWARDS.

*Overruled by
Randolph vs. Little
62 A.*

[MOTION BY DEFENDANT IN ATTACHMENT TO HAVE SET APART TO HIM AS EX-
EMPT UNDER THE STATUTES, A SUM OF MONEY IN THE HANDS OF GARNISHEE,
AGAINST WHOM JUDGMENT AND EXECUTION HAD BEEN AWARDED IN FAVOR OF
THE PLAINTIFF IN ATTACHMENT.]

1. *Exemption statutes construed.*—In this State the claim of a resident citizen to such portion of his personal property as is exempt from sale on execution, or other final process of any court, issued for the collection of any debt, is an important and “valuable legal right.”—18 Ala. Rep. 127.
2. *Same.*—Laws for the protection of this right in this State have always been liberally construed.—22 Ala. 624.
3. *Same.*—Under the laws of Alabama, money is personal property, and a resident of this State is entitled to have \$1,000 of his personal property exempt for the use of his family, and the personal property so reserved may consist of money. Under the constitution, a resident without a family may claim this exemption.—Const. Ala. 1867, Art. 14, § 1; Revised Code, § 2884.
4. *Same.*—A defendant in an attachment and garnishment suit may go into the circuit court, and on motion in that court may claim a sum of money equal to the value of \$1,000, while in the hands of the garnishee against whom judgment has been rendered, or after the same has been collected by the sheriff on execution against the garnishee, and have his claim to the money thus collected tried and determined by a jury, as upon a motion to show cause against a rule for the payment of the money to the claimant as his exempt property.
5. *Same; verdict of jury on trial of such motion, effect of.*—On the trial of such a motion, when all the parties in interest are before the court,

Webb v. Edwards.

and there is no exception, the verdict of the jury is conclusive, if the law is with the claimant.

6. *Exemption, claim of; when not too late.*—The claim of such exemption does not come too late when it is made before the money thus collected is paid over to the plaintiff in the attachment suit.
7. *Judgment, what will be corrected in supreme court.*—A judgment in the court below in favor of the moveant in the court below, "*or his attorneys of record [naming them],*" will be corrected in this court, when the verdict in the court below was in favor of the moveant and the attorneys were not parties to the suit, by arresting that part ordering payment to the attorneys of record, and the judgment as thus corrected affirmed.

(PECK, C. J., *dissenting.*)

APPEAL from the Circuit Court of Henry.

Tried before Hon. J. McCaleb Wiley.

THE facts of this case may be stated as follows: The appellant, on the 28th of January, 1867, sued out an attachment against the appellee, in the circuit court of Henry county, which was executed by summoning one George Searcy, a person supposed to be indebted to said defendant, as garnishee.

The garnishee appeared, and answered in writing, that he was indebted to said defendant in the sum of seven hundred and eighty-six 73-100 dollars.

At the spring term of said court, in 1869, the plaintiff, said appellant, recovered a judgment against defendant, said appellee, for thirteen hundred and thirteen 62-100 dollars; and, after the rendition of said judgment, at the same term, he recovered judgment against said garnishee, on his answer, for the said sum of seven hundred and eighty-six 73-100 dollars, the amount he had admitted he owed the said defendant. Of this sum, plaintiff has collected, by execution, of said garnishee two hundred and fifty-four 56-100 dollars, the remainder being unpaid.

At the fall term of said court, 1869, the defendant in said attachment made the following motion, to-wit: "Motion is made by defendant to have set apart to him the sum of one thousand dollars of the money in the hands of the garnishee, as exempt under the laws of the State, in favor of the defendant, who is and was at the time of the ser-

vice of the garnishment, the head of a family and a resident of the State.”

This motion was resisted by appellant on the following grounds, to-wit : 1. “That the court had not jurisdiction to grant said motion, because a final judgment had been rendered in favor of the plaintiff against the garnishee, Searcy, at the spring term, 1869.” 2. “Because said motion was not made until six months after the condemnation of the debt due by garnishee.” 3. “Because the judgment against the garnishee was the property of the plaintiff.”

From a bill of exceptions in the record, taken by the plaintiff, it seems the said motion was tried by a jury, but what the issue was does not appear.

On the trial, the testimony consisted of evidence that defendant was the head of a family, as stated in the motion, and the proceedings and judgments in the attachment case against defendant and said garnishee, and that two hundred and fifty-four 56-100 dollars had been collected and paid on said judgment against said garnishee.

The bill of exceptions says this was all the evidence. Thereupon, the court, at the request of said defendant, said Edwards, charged the jury, that if they believed the evidence, they must find for him.

The jury found accordingly. But what was found does not appear, as no issue is stated in the record to which it was a response. The bill of exceptions says, “said jury found for said Edwards,” and the minute entry states, “they” (the jury) “find for the moveant.” The judgment of the court is as follows : “It is, therefore, considered by the court, that the sheriff pay over to the said defendant, James J. Edwards, or his attorneys of record, Messrs. W. C. Oates and F. M. Wood, when collected, the balance of the money due on the judgment of the plaintiff against the garnishee, George W. Searcy. It is further considered by the court, that the defendant recover of the plaintiff the costs in this behalf expended, for which let execution issue.” To the said charge, rulings and judgment of the court, the plaintiff excepted.

The case is here on plaintiff’s appeal for revision, and

the rulings, charge and judgment of the circuit court are assigned for errors.

J. A. CLENDENNIN, for appellant.—Could the legislature pass a law that would authorize a court to annul and set aside the service of process which had been perfected before the passage of the act of 19th of February, 1867, (§ 2884 of Revised Code,) under which the appellee claimed the right to sustain the motion?

The appellant was pursuing nothing but his rights recognized by the existing law. It was the duty of both the defendant and the garnishee to interpose all claims of right or defense as against the plaintiff's proceeding, before the rendition of judgment. When the judgments were rendered, they were final and conclusive between the parties thereto, unless appealed from.

The judgment against the garnishee forever stopped the defendant in attachment from the collection of his note out of the garnishee, and it would have been the same with any other person to whom he may have disposed of it, and who had not given notice. The note itself was still the property of the defendant in attachment, but a change had taken place in respect to the debt. After the judgment of condemnation, it certainly did not belong to the defendant in attachment. The record recites it as a judgment in favor of the appellant; and he certainly had all the rights in it that any other plaintiff could have in a judgment, with this single contingency, that his right to it ceased when the appellee paid the judgment against himself, the garnishment judgment remaining unsatisfied.

In the case of *Weaver et al. v. Lapsley*, 43 Ala. 232-3, this court fully settled the question as to the rights of a plaintiff in a final judgment. They are pronounced contracts, and impose the highest obligations. Such contracts are entitled to the protection of the constitution equally with other contracts, and no State can pass any law impairing their obligation. They also decide that a plaintiff has a vested right in a final absolute judgment that has passed beyond the control of the court, as much as he has

in his dwelling house or farm, and they are all equally property and entitled to protection alike.

It results, then, if the judgment against the garnishee was the property of the appellant, he could use or dispose of it as he pleased. It was the right of the appellant to withhold the issuance of an execution upon it, against the garnishee, if he saw proper to do so.

After the adjournment of the court which rendered the judgment, said court ceased to have power to annul or set aside said judgment, unless by proceedings coming within the plain letter of the statute. None such appear to have been instituted.

Under and by what process would the sheriff collect the money upon the judgment other than execution, the mandate of which commands him to have the proceeds to render to the plaintiff in the judgment? and yet here is another mandate requiring him to render the same to another and different party, and depriving the attorney of record of the plaintiff in the judgment of his rights.

In the case of *Bell v. Davis*, 42 Ala. 160, the party claiming the exemption lost his right by the failure to interpose his claim at the proper time.

Has not the appellee, by his neglect and failure to bring to the notice of the court below his claim before rendition of judgment, forfeited all right or claim to have the vested rights of the appellant torn from him in the summary way in which it was done?

W. C. OATES, and F. M. WOOD, *contra*.—1. The law of this State permits a defendant to claim property as exempt at any time before a sale. And we claim that where a levy is made by garnishment, the defendant can claim the money in the hands of the garnishee at any time before it is reduced to the possession of the sheriff, or applied by him to the plaintiff's debt.

Suppose the money had been paid into court by the garnishee when he answered, could the defendant not have claimed it before it was paid over to the plaintiff? And at any time before payment of the money to the plaintiff,

could not the court have ordered the money paid by the clerk to the defendant? The sheriff is as much under the power of the court as the clerk, and why could not the court order the *sheriff* to pay the exempt money to the defendant, if it could have ordered the clerk to do it?

Exemption laws are to be construed liberally, and with this construction it is plain that the appellee was entitled to the exemption. It is the amount exempt, and not the particular thing claimed as exempt, which concerns the creditor.

By the paying over of the money in the hands of the garnishee to the defendant, the plaintiff's judgment against the defendant in attachment was not annihilated. It was still subsisting. Preventing the plaintiff from taking satisfaction out of the particular fund in the hands of the garnishee, was only a modification of the remedy, such as under the decisions of our supreme court can be made without impairing the obligation of the contract. The judgment against the garnishee was only a remedy given for the collection of the original debt.

The fault of the appellant's argument is, that it omits to notice that under our law the judgment creditor has no absolute right to satisfy his judgment out of a particular fund that may be lawfully claimed as exempt. Enforcing the exemption is not destroying a judgment, but enforcing a right existing before the judgment was rendered.

Construing the exemption law liberally, why may not the money in this case be claimed as exempt at any time before being paid over to the plaintiff? There are no elements of estoppel, as claimed by appellant. Courts can always alter, or correct, or control their process so as to prevent injustice and to enforce rights; there is, therefore, no valid reason why the court can not order the money paid over to the claimant, notwithstanding it might have been collected on an execution in favor of the plaintiff. The money collected of the garnishee was certainly the property of the defendant, else how could the appellant have a judgment against the garnishee?

PETERS, J.—The issues made in this record do not involve any question of constitutional power to make the exemption in controversy. Nor do they present any question which puts the policy of exemption laws upon trial. If they did, it seems to me that it would not be difficult to show that in a great republican and agricultural nation, as this is, it is of the utmost importance to the stability and prosperity of the State, that *all* its citizens, in whom its sovereignty is vested, shall have homes, and the means of support for their families and the education of their children. In such an inquiry, it is to be presumed that a people well educated and diligently instructed in christian morals, if they are provided with homes and the means of cultivating their farms, will always pay their debts, if indeed such a people do not soon cease to be a debt-owing community altogether. In this country, the people represent the nobility of other nations. And there is no nation of any importance in history, that has deprived its nobility of their homes and the means of a comfortable support, in order to secure the payment of their debts. An English lord or prince would regard it as an assault upon the constitution of their country, to attempt to render his home and the means of his support subject to the payment of his debts. This exemption on their behalf they laud as the safeguard of the state. Why should it be less so here? The principle in the one case is equally good in the other. It is this: the citizen in whom the sovereignty is vested should be placed in a situation to raise him above the hindrances and the temptations of poverty. In the system from which ours is, in great measure derived, the people are ranged into two classes: the *prince* in the one, and the *subject* in the other. Our system makes all princes, and all are alike entitled to the exemptions to which princes may claim to be entitled. A home, and the means to make it useful, and some degree of intelligence, are elementary necessities of the governing classes. *With us, all belong to this class.*—Decl. Indep.

The courts, having no legislative powers here, have simply copied so much of the English commercial system

as they have deemed suitable to our institutions; and the common law of the prince and his agricultural exemptions are altogether left out. This is now corrected by the legislature. And it is the duty of the courts to see that this correction has not been made in vain. No opposition to this correction can stay it from the accomplishment, sooner or later, of the high purpose for which it is designed. We have bidden farewell to the age when the interests of hucksters, and peddlers, and money-changers can subject to their uses the liberty, the home and independence of the citizen and prince.

The courts must execute the laws. In this State, their officers are solemnly sworn "*honestly and faithfully* to support and defend the constitution and laws of the United States, the union of the States, and the constitution and laws of Alabama."—Const. Ala. 1867, Art. XV. It scarcely needs an argument to show that to "support" a law means to enforce it, and to prevent any failure of the purpose for which the legislative authority brought it into being. If a law is permitted to fail of its purpose, it is rendered of no effect. Then it can not be said to be supported.

Among the duties courts have to perform, it is said, with them, that there is no right without a remedy. *Ubi jus, ibi remedium*.—Co. Litt. 191; 1 Term R. 512; 3 Bouv. Inst. n. 2411. And where the court may rightfully deal with the subject of controversy and the parties, and there is a right to be investigated, and the law has not prescribed a rule of practice, it is competent for the court to prescribe its own practice. Hence it is said, "the practice of the court is the law of the court." *Cursus curiæ est lex curiæ*. Broom Max. 126. Besides, the court "may amend and control its process and orders so as to make them conformable to law and justice."—Rev. Code, § 638, cl. 6.

Property which the "constitution and laws" of the State exempt for the use of the debtor and his family can not be said to be liable to seizure for the payment of his debts. And the creditor who contracts with a debtor knows, at the time of the contract, that the exempt property is freed from all liability for payment of any save certain specified

debts. He can not, therefore, complain, as he acted with his eyes open to such a condition. It is a risk that the creditor is willing to encounter, and if it brings harm upon him, it is his own fault. The law itself prejudiceth no man.

Here there can be no doubt of the appellee's right. The proofs show that he is a resident of this State, and the head of a family. The language of the constitution fixing the exemption is as follows: "The personal property of any resident of this State to the value of one thousand dollars, *to be selected by such resident*, shall be exempted from sale on execution, or other final process of any court, issued for the collection of any debt contracted after the adoption of this constitution."—Const. Ala. 1867, Art. XIV, § 1. In addition to this, there is a similar provision in the Revised Code, which exempts one thousand dollars worth of personal property.—Rev. Code, § 2884. This exemption is said to be "a valuable legal right," and the laws for its support and protection have always been liberally construed.—*Ross v. Hannah*, 18 Ala. 125, 127; *Favers v. Glass*, 22 Ala. 621, 624; *Watson et al. v. Simpson*, 5 Ala. 233; *Noland v. Wickham*, 9 Ala. 169; *Salée v. Waters*, 17 Ala. 482; *Cook v. Baine*, 37 Ala. 350. It is the duty of the court, then, to support and enforce this law until it is repealed.—*Adm'r of Brewer v. Granger et al.*, in MS.; *Ray v. Adams*, 45 Ala. 168.

This proceeding is analogous to that of several parties claiming the same fund in different rights, as upon a motion or cross bill, where the subject matter of the controversy and all the parties are within the jurisdiction of the court. No injustice can be done by such a practice. All the parties can be heard, and in the manner appointed by law: by a public trial before the court and jury. This is all that the law secures, and all that justice requires.—Const. Ala. 1867, Art. I, §§ 15, 13; 20 Ala. 140, 214. There is no authority given by law to the officer who makes the collection of the money in controversy to allow the exemption. But he can bring the money into court on the

return of the process under authority of which it has been levied, and leave the court to dispose of it as the law directs. This is the mandate of the writ.—Rev. Code, § 2837. Undoubtedly, money collected on a *fieri facias* is personal property.—Rev. Code, § 2, cl. 3; 2 Tidd Pr. 1003. And in this case, it is the personal property of the defendant in the attachment suit, seized under final process of a court, issued for the collection of a debt.—Const. Ala. 1867, Art. XIV, § 1. The owner could not interpose his claim sooner, because there was no one authorized to hear it. And the motion interposing the claim has been made in this instance before the property claimed has passed from the control of the court, while the proceedings were yet in *fieri*. This is early enough.—*Watson et al. v. Simpson*, 5 Ala. 233, *supra*; *Simpson v. Simpson*, 30 Ala. 225. In such a case as this, the claim may be made upon motion to the court, by analogy to cases of a similar character. The same reasons make the same practice. (*Est boni judicis ampliare jurisdictionem*. Gilb.)—*Rutledge's Adm'r v. Townsend, Crane & Co.*, 38 Ala. 706; *Langdon v. Raiford*, 20 Ala. 532; 3 Chitt. Pr. 570, 571; *Jones v. Hutchinson*, 43 Ala. 721. Besides, the appellant in this court, who was the defendant in the motion in the court below, submitted to the jurisdiction without objection, pleaded and went to trial before a jury. He can not now repudiate his acts in the court below. This proceeding is analogous to an agreed case, leaving certain of the facts to the jury. In such a case, defendant below is bound by the verdict, if the law is against him.—Dane Abr. c. 137, Art. 4, § 7; 8 Sergt. & R. 529. And I think there is no doubt that the law is with the appellee, and that the verdict and judgment are correct as rendered in the court below, except as to the order to pay the money to appellee's attorneys, which is here arrested.

Therefore, let the judgment of the court below, as corrected, be affirmed.

PECK, C. J., (*dissenting*).—I. The novelty of the question here presented, at first blush, would seem to involve its de-

cision in more or less difficulty, but an examination of the several sections of the Revised Code having reference to this subject, at once dissipates this apparent difficulty.

1st. Let it be borne in mind that the right, if it may properly be called a right, of a head of a family to have any of his property exempted from levy and sale for the payment of his debts, is purely statutory in its character, and has no existence independent of the statutes by which it is given.

2d. Being a statutory right, it can only arise in the cases named in the statutes, and must be made within the time, and in the manner, and in the cases therein prescribed.

3d. It is a right, in every case, personal to the head of a family, and must be claimed by himself, and by no body else, and it must be made before a sale of the property; otherwise the right is lost. He can not claim or have the money arising from the sale, because the statutes do not say so.

4th. The claim is a pure matter of grace, and not of debt; therefore, the beneficiary must take what is given and be content; he can have nothing more. And this should be so, for the reason that it is of grace and not of debt; and for the further reason, that the State, in this matter, is generous—not with her own, but with what, on the highest principles of morality, should belong to another; for every dollar a debtor is in this way permitted to withdraw from the payment of his honest debts, is a dollar, first or last, taken from the pockets of the creditor.

The present enormous system of exemption laws, in the beginning, grew out of the purest feelings of philanthropy and good will, and was intended to help the poor, and to encourage them in the ways of honesty, industry and economy, and to secure to them the enjoyment of the common comforts and decencies of life, and thereby enable them to improve their condition.

For this purpose these laws wisely confined exemptions to a few necessary articles of daily family use, including among them the usual implements of husbandry, with a beast for the plow, and the tools of the mechanic; but this

system, which had its commencement in charity and good intentions, has been fed into its present unhealthy proportions by the false and hypocritical cries of sympathy on the part of demagogues and time-serving politicians for the "poor dear people," until nearly all just sense of obligation and duty to observe honest promises has become demoralized, and amounts, in reality, to almost an utter abrogation of all laws for the collection of debts. For it may be safely affirmed, that in no State or community is one-fifth of the people, as a body, at any one time worth the amount of property now exempted from execution.

The result of all this is, that the poor, instead of being benefitted by these laws, and their best good and prosperity promoted, are being seriously injured by the destruction of the trust and confidence that once existed, not only between them and their better-off neighbors, but also among themselves. Trust and confidence is the very life—the foundation of neighborhood commerce, without which no people, especially the poor, ever prospered or can prosper.

Moderate and discreet exemption laws are both just and right in themselves, and are, no doubt, a great benefit and blessing to that portion of the people for whom they were first intended; but, for myself, I desire to set my seal of disapprobation upon the extravagant lengths to which these laws have been extended by the legislation of this State.

II. I will now refer to the sections of the Revised Code upon which this opinion is based. Section 2880 provides, that "the following property may be permanently *retained* for the use of every family in this State, exempt from *levy and sale*, by any legal process." Then follows a list and description of the property so exempted, both real and personal, the value of which, according to the very lowest estimate, can hardly be less than fifteen hundred dollars.

This would seem to be enough to enable a prudent and industrious family to make a comfortable living.

1st. This property is to be selected by the head of a family, and valued by three-disinterested persons, to be selected by the sheriff, or other person *levying the process*. So stood the law on this subject until the 19th of February,

1867, when an act was passed which forms § 2884 of the said Code, by which twelve hundred dollars of real estate and one thousand dollars worth of personal property is added to the list of property then already exempted from levy and sale, for the use of the family.

By these sections we see that the property thus exempted is property *that may be levied upon and sold by the sheriff or other officer, under process in his hands for that purpose.*

2d. That only such property is exempted as shall be in the *possession of the head of the family at the time of the levy*, and which must be selected by him, after the levy, and before the sale thereof.

By section 2883, the value of the property so exempt must be ascertained by three disinterested persons summoned by the sheriff, or other officer *levying* the process. It follows, from this, that the property so exempt must be property, not only liable to be levied upon and sold, but must also be property possessed by the head of a family; for if not possessed, it can not be retained, and, furthermore, it must be levied upon before the sheriff, or other person levying the process, can proceed to have its value ascertained by the persons to be summoned for that purpose.

3d. The question now arises, what property may be levied on and sold, by execution or other legal process? By section 2871, Revised Code, we see that "*things in action*" can not be levied on and sold. By "*things in action*" is understood "*choses in action.*" The word "*choses*" means things. All debts are choses in action, and, therefore, things in action are not liable to be levied on and sold, and, consequently, not such property as can be reserved or retained for the use of a family, under the exemption laws.

That was the purpose of the motion in this case. The appellee in the circuit court sought to have the money that might be collected by the appellant out of the property of the garnishee, on his judgment against the garnishee, paid to him, under the laws exempting certain property from levy and sale, for the use of his family. This could not

be done. The said judgment is not such property as is embraced within the purview and meaning of these laws. It was not, and could not be levied on and sold as property. It is not property in the sense of these laws, but a mere thing in action. The said judgment is in favor of the appellant, against the garnishee, and not against the appellee. It is the appellant's judgment, and an execution issued on it can not be levied on the appellee's property, but only on the property of the garnishee. He is not, therefore, entitled to have property levied on for its satisfaction, being the property of the garnishee, exempted from sale for the use of his family; and if he is not entitled to have the property so levied on, it is very certain he can not have the money that may be derived from its sale. The motion was without any legal foundation, and should not have been entertained by the court; consequently, the charge to the jury was erroneous.

NOTE.—The foregoing opinion was prepared as the opinion of the court, but not meeting with the approbation of my brethren, I read it as a dissenting opinion.

PECK, C. J.

OVERSTREET ET AL. vs. THE STATE.

[INDICTMENT FOR ARSON.]

1. *Court, sentence of, in felony case; when void.*—The sentence of a circuit court, in a case of felony, rendered at a special term not held on the application of the person charged, nor on account of a failure to hold a regular term, is invalid.
2. *Motive to commit crime; when evidence of admissible.*—Evidence of a motive to commit the offense charged, though weak and inconclusive, is admissible where the commission of the crime is shown and the circumstances point to the accused as the guilty agent.
3. *Arson; what sufficient proof of.*—An indictment for arson in burning

a gin-house is sustained by proof that it was burned by the ignition of matches which the defendant put amidst the unginned cotton in the gin-house, with the intention of having the house burned by the ignition of the matches in the necessary or probable handling of the cotton.

APPEAL from Circuit Court of Wilcox.

Tried before Hon. P. O. HARPER.

THE appellants, Tom Petway, Hilliard Petway and Emanuel Overstreet, were jointly indicted for wilfully setting fire to and burning a gin-house, the property of J. H. Petway, of the value of more than five hundred dollars, &c. The defendants were tried at a special term of court held on the first Monday in February, 1871, went to trial on plea of not guilty, were convicted, and sentenced to the penitentiary.

The caption of the minutes of the special term is as follows: "Now on Monday, the 6th day of February, 1871, it being the day appointed and set apart to begin and hold a special term of the circuit court for Wilcox county, due publication thereof having been made by notice for thirty days of the time and place for holding the same, said notice having been given by the order of the Honorable P. O. Harper, judge of the 11th judicial circuit of the State of Alabama, which notice was regularly published in the *News and Pacificator*, a newspaper published in said county of Wilcox, and the Hon. P. O. Harper, judge of the 11th judicial circuit of Alabama, being present, the court was regularly opened," &c.

The notice referred to was as follows :

"Special Term of Wilcox Circuit Court.

GREENVILLE, ALABAMA, }
At Chambers, Dec. 28th, 1870. }

"It is ordered, that a special term of the circuit court for Wilcox county be held, commencing on the 1st Monday in February, 1871, and continuing two weeks, for the trial of unfinished criminal business. All witnesses must be

summoned to attend said term, and all process relating to the business of said term made returnable to it.

P. O. HARPER,

Judge of 11th Judicial Circuit."

It appears from the bill of exceptions reserved on the trial, that the State having proved the burning, the *venue*, and the ownership and value of the property, as laid in the indictment, introduced one Burgess, who testified that he was the owner of fifteen bales of cotton burned in the gin-house; that Hilliard, one of the defendants, was unfriendly to him; that Tom was mad with J. H. Petway, and said J. H. Petway would lose more than ten times fifteen dollars. The court overruled defendants' objection to the admission of this testimony, and they excepted.

The State was also allowed, against defendants' objection, to introduce evidence that Tom Petway, one of the defendants, while on the way to jail, during an interval of adjournment in the trial, remarked that "Jacob Purnell, a witness for the State, had better look out, as he would be killed about saying such a lie as he did about defendants confessing they had burned the gin."

There was testimony introduced going to show that the defendant Overstreet, just before light on the day of the fire, went into the upper part of the gin-house, and threw matches in the cotton to be ginned, while the other defendants watched for him, and helped him up in the gin-house. Soon after the ginning commenced next morning, fire broke out in the gin and lint cotton.

This was in substance all the evidence. The defendants asked the court in writing to give the following charges to the jury:

1. "That the throwing of matches on a pile of unginned cotton is not a setting fire to or burning of said gin."
2. "That before convicting in this case, the State must prove beyond a reasonable doubt that the matches thrown on the unginned cotton would have ignited by going through the gin and set the gin house on fire."
3. "That before they can convict, they must be satisfied beyond a reasonable doubt that the gin-house and its con-

tents, the cotton, belonged to Petway, the owner of the gin-house, and were worth five hundred dollars; and if the gin-house was Petway's, and not worth five hundred dollars, they could not convict."

The court refused to give the charges, and defendants excepted, and they now assign as error the various rulings of the court to which exceptions were reserved.

JOHN MCCASKILL, for appellants.—1. The court erred in allowing the witness Burgess to give evidence of the unfriendly relations existing between himself and the defendant Hilliard Petway, and the declarations of Tom Petway as to the ill will he had for J. H. Petway, unless a threat had been made. The evidence was used as well against Emanuel Overstreet as the other defendants, and prejudiced the jury against all the defendants.

2. The court erred in allowing the witness Ingersoll to tell what Tom Petway said on his way to the jail, as it tended to impeach his (the defendant Tom's) character, and was used against all the defendants, and when there was no character in issue.

3. The court was held contrary to law. This record does not show that any of the reasons mentioned in section 752 of the Revised Code for holding special or extra terms of the circuit court existed, and as a matter of course all orders and sentences are void.

JOHN W. A. SANFORD, Attorney-General, *contra*.—Evidence in regard to the enmity felt by the accused towards the owners of the property destroyed, was properly admitted, because it showed a motive for the conduct of the accused, and tended to prove the question at issue.—*Balaam v. The State*, 17 Ala. 451; *State v. Zeller*, 2 Halst. 220; *Rosc. Cr. Ev.* 87-8; *Burr. on Cr. Ev.* 313-14.

The evidence of the angry denial by one of the accused of the truth of the testimony, may have been improperly admitted, but it was an error without injury, and therefore ought not to cause a reversal of the judgment.—*The State v. Brantly*, 27 Ala. 44; *Reese v. Harris*, 27 Ala. 306.

The law presumes that all persons intend the natural and probable consequences of their acts. Hence, a person will be convicted of murder who prepares and places poison with the intention to take the life of a human being, and a person is killed by it. So, the placing of matches in unginmed cotton, with the intention to burn a gin-house, and the house is actually destroyed by fire originating from them, is guilty of arson.—1 Bish. Cr. Law, §§ 248, 513; Russ. & Ryan, p. 207.

The court did not err in refusing the second charge, because it was abstract. There was no evidence tending to prove the composition of the matches or the effect of friction upon them.—*Murray v. The State*, 18 Ala. 727-32.

Nor did the court err in refusing the third charge. The evidence proved that the gin-house was owned by Petway; it is not necessary that the personal property contained and burned in it should have belonged to the same person. Rev. Code, § 3698. Therefore, the charge was properly refused.

B. F. SAFFOLD, J.—This cause, being an indictment for felony, having been tried at a special term of the court held not on the application of the accused, nor in consequence of the failure to hold a regular term, must be reversed.—Rev. Code, § 752; *Gully v. The State*, in MS.

The testimony of Burgess respecting the unfriendly feeling of one of the defendants towards himself, it being his cotton that was burned, and the threat of another defendant towards the owner of the gin-house burned, was properly admitted in evidence. When it is shown that a crime has been committed, and the circumstances point to the accused as the guilty agent, proof of a motive to commit the offense, though weak and inconclusive evidence, is nevertheless admissible. The jury should be guarded as to the importance they attach to it, and especially should they not suffer it to affect the case of a co-defendant to whom it does not apply.—*Balaam v. The State*, 17 Ala. 451.

The declaration of the defendant Tom Petway, on his

return to jail during a recess in the trial, concerning the witness Burrell, was irrelevant.

A general consideration of the charges asked for the defendants and refused, will be sufficient. The evidence tended to show a burning of the gin-house by the ignition of matches passing through the gin, which were thrown by the defendants into the cotton to be ginned. Every man is presumed to intend the natural, necessary, and even probable consequences of an act which he intentionally performs. There must also be some adaptation in the thing done to accomplish the thing intended.—1 Bish. Cr. Law, §§ 513, 516. If the defendants put the matches in the gin-house amidst the unginned cotton, with the intention and expectation of their being ignited by the necessary or probable handling of the cotton, or in such handling, and they were ignited, in consequence of which the gin-house was burned, they would be guilty of burning it. As the house was charged to be the property of Petway, it was necessary so to prove it, but it was immaterial to whom the cotton belonged.

The judgment is reversed, and the cause remanded.

PIZZALA vs. CAMPBELL, ADM'R.

[EJECTMENT BY ADMINISTRATOR AGAINST WIDOW.]

1. *Leasehold; widow not entitled to rents and profits of.*—A leasehold is not such an estate as the widow of the lessee is entitled to retain the rents and profits of, by Art. 14, § 5 of the State constitution.
2. *Widow's quarantine.*—The widow's quarantine, as given by section 1630 of the Revised Code, pertains exclusively to property of which she is dowable.

APPEAL from the Circuit Court of Montgomery.
Tried before Hon. J. Q. SMITH.

The facts appear in the opinion.

WALKER & MURPHEY, for appellant.—The only question in this case is, whether the widow of a decedent without children is entitled to occupy the family residence at the time of the death, as a homestead, which was held under a lease, and not in fee simple.

The constitution provides, that “if the owner of a homestead die, leaving a widow, but no children, the same shall be exempt, and the rents and profits thereof shall inure to her benefit.”—Constitution, Art. 14, § 5.

The rented house of the decedent’s residence is a homestead. It is not necessary that the decedent shall have been the owner of the land. There is a distinction between the *land* upon which one has a home, and the *home* itself. A man may be the *owner* of a homestead *on land* when he does not *own the land*. If one living in and only having a rented tenement were asked whether he owned land or not, he would answer in the negative. If asked whether he had or owned a home, he would answer in the affirmative; for although he had no land, he really had a home.

A homestead is not really land, but the quality given to or impressed on land by reason of its being a habitation or dwelling place. Land and house are elements of a homestead, inasmuch as there can not be a homestead without their presence; but *ownership* absolutely of the land is not indispensable to the constitution of a homestead. Homestead is nothing more than the quality of a home imparted to land and house by reason of a residence upon the land and in the house.

A man may have a home on a piece of land in which he has only a leasehold interest; that is, he owns the quality attached to the property of being a home.

There is a principle of law which guards a man’s home and house, and pronounces his house his castle. Would the house be the less his castle, if he were a mere tenant, than if he were the owner of the soil?

A tenant may have a lease extending through a period

of twenty-five years under our law. If the proposition of the appellee be correct, the widow of a lessee for twenty-five years would not be entitled to a homestead, even though a lease for that time had been paid in full. A homestead in a lease for twenty-five years would in most cases be worth as much as a homestead on land to which there was a fee simple title. It would be immaterial to a widow sixty years of age whether her homestead was in land with a fee simple title, or in land with a lease for twenty-five years. Yet the proposition of the appellee would deprive the widow of a homestead where there was a lease for twenty-five years, and give it to her if there was a fee simple title. How could such a discrimination be excused or justified?

The construction of all the exemption laws should be favorable to the exemption.—*Allman v. Gann*, 29 Ala. 240; *Favers v. Glass*, 22 Ala. 621.

The position, that there may be a homestead in a leasehold estate, is fully sustained by authority.—*Pelan v. De Vard et al.*, 13 Iowa, 53.

CAMPBELL & HUBBARD, for appellee.—Estates in lands, tenements, &c., are those of *freehold* and those of *less than freehold*.

A *homestead* to widow without children, being an *estate for life*, (Const. Ala. 1867, Art. 14, § 5; Washburn on Realty, vol. 1, pp. —; *Kesley v. Kesley*, 13 Allen, 287,) is a *freehold estate*, not of inheritance.

Pizzala's interest in the rooms in question being a lease only for a year is an estate less than freehold.

To hold that the widow is entitled to homestead in the rooms, would be to decide that a freehold estate can be carved out of an estate less than freehold; that the less includes the greater; that a part is greater than the whole.

The *right* is the exemption of a *homestead* from debts, arising *solely* from the *statute*; the *true* and *legal* *signification* of the word can only be derived from the statute enacting the same.

What constitutes a homestead under our statutes?

The realty in which it is claimed must not only be occu-

Pizzala v. Campbell, Adm'r.

pled but *owned* by the claimant through whom it is claimed. Const. Ala. 1867, Art. 14, § 2.

B. F. SAFFOLD, J.—The appellant was sued in ejectment by the administrator of her husband's estate, to recover the possession of rooms in a building which he had leased for a year, and which she claimed the right to retain as his homestead, or dwelling house where he resided next before his death, under Article XIV, section 5, of the State constitution, and section 1630 of the Revised Code.

The widow's quarantine, as given by section 1630 of the Revised Code, pertains exclusively to premises of which she is dowable, else, as she may retain them until her dower is assigned her, if she has no dower there would be no limit to her right of retention.

The XIVth article of the constitution preserves the distinction heretofore observed between real and personal property. It defines a homestead to be land, or a lot in a town, city or village, to be selected by the owner thereof, with the dwelling and appurtenances thereon, &c. The interest of a widow in the estate of her husband is her distributive share of his personal property, which she takes absolutely, and her life estate in his real property. A lease for a year, or term of years, is personal property. The homestead which the widow of the owner is to have the rents and profits of under section 5, is the homestead described in section 2 of Article XIV of the constitution.

The judgment is affirmed.

Appellant filed the following petition for a re-hearing :

The appellant respectfully petitions the court for a re-hearing, and presents the following argument in support of the application :

1st. The question is entirely new in this State. Arising under our new and recently adopted constitution, there is in this State as yet no precedent to guide in its decision. It is difficult to perceive the consequences of a decision of a question so new and so unprecedented. It would seem,

therefore, that the question is one deserving the most careful consideration.

2d. The opinion delivered does not consider either the argument or authorities in the written brief of appellant's counsel, and it is possible that those arguments and authorities may not have been considered by all the judges. They certainly were not presented to the other judges by reading the opinion in consultation.

The argument of the court in the opinion is very brief, and is substantially this : That a homestead is defined by Article XIV, section 2, of the constitution ; that by that definition there can be no homestead without *ownership* of the land ; that homestead, in the 5th paragraph of that article, means the same thing with homestead in the 2d paragraph ; and that therefore the widow can not be entitled to a homestead where the husband had only a leasehold estate and was not the owner of the land.

Now, it is respectfully submitted, that homestead is not defined in paragraph 2. The first clause exempts from execution a *homestead* not exceeding forty acres of land, to be selected by the owner *thereof*, (that is, of the homestead) ; and not in any town, city or village ; *or in lieu thereof*, any lot in the city, town or village, owned and occupied by a resident of the State, and not exceeding two thousand dollars in value.

It will be perceived that the second paragraph provides, first, for the exemption of a homestead, without defining it, and then it authorizes the substitution of a lot in a city or town, *owned* and occupied, at the option of an owner. The meaning of this paragraph is, that one having a homestead may, instead of the homestead, take a lot owned and occupied by him. One may own and occupy a lot, and yet that lot may not be a homestead. He may reside elsewhere, and use the lot as a shop or place of business. In a case of this sort, where a man has a homestead, and besides owns and occupies a lot, he may at his election give up the homestead and take the lot which he owns and occupies.

It is apparent that homestead is not defined in the sec-

Pizzala v. Campbell, Adm'r.

ond paragraph, and that homestead is used rather in contradistinction to land owned and occupied.

We refer to our argument already submitted, to show that homestead has a meaning wide enough to include a leasehold estate, and is not confined to land which was owned.

This case was not orally argued.

The conclusion attained by the court as to the meaning of homestead will operate with great injustice. It will convert a widow on rented premises into a trespasser in the instant of the husband's death.

That a man may be the owner of a homestead without being the owner of land, is, as we think, shown in our original brief in this case.

The following response was made by—

SAFFOLD, J.—The court decides that the judgment rendered in this case at this term is correct, and that the application for a re-hearing must be denied.

My own opinion is, that the provisions of Article XIV of the State constitution are not at all influenced by any impress of the term homestead, as a home, habitation or dwelling place. The second section reserves from his debts two thousand dollars worth of any real estate which the owner thereof may select, whether it has previously been his home, or dwelling place, or not. If he can make a better use of it than to reside upon it, he is at liberty to do so. The first section prescribes the least amount of personal property owned by a citizen which shall not be subjected by the legislature to the payment of his debts, and the second, the least amount of real estate. If this construction be correct, a leasehold can not be the subject of a homestead, because it is personal property.

The construction contended for by the appellant's counsel would involve changes in the law which the legislature only is authorized to make. And they would depend solely on the association of an ideal home with every fugitive or temporary abiding place.

OLIVER vs. JERNIGAN.

[BILL IN EQUITY BY TENANT IN COMMON AGAINST HIS CO-TENANT FOR SALE OF LANDS FOR PARTITION.]

1. *Chancery. court of; what sale has no jurisdiction to decree.*—In this State, the court of chancery has no jurisdiction to decree the sale of the lands of a tenant in common, who is of full age, without his consent, for the purpose of partition, because the same can not be equitably divided.
2. *Tenant in common of full age, lands of; when can not be exactly divided, what allotment may be made.*—If the lands of tenants in common of full age are not susceptible of an exact division, an allotment may be made in unequal shares, with compensation for the inequality, by creating a rent or charge upon the land; or, if the land allotted to one exceeds in value that allotted to the other, the court may compel the former to make compensation to the latter, for equality of compensation.
3. *Same; rules as to partition of lands, title of which is in dispute, to what applies.*—The general rule, that partition will not be decreed in equity where the title is in dispute, applies to a legal and not to an equitable title; and if, on a bill for partition, the defendant wishes to avail himself of an equitable defense, as, for instance, a defense arising out of a contract for purchase, &c., he must file a cross bill, or, under our system, he may set it up in his answer in the nature of a cross bill, and pray such relief as he may believe he is entitled to.
4. *Partition, &c, bill for; when decree for rent, &c., may be rendered on.*—On a bill for partition, where one of the tenants in common has been in the exclusive possession and enjoyment of the joint property, the chancellor, in a proper case, may decree an account for occupation, rent, &c.

APPEAL from Chancery Court of Bullock.

Heard before Hon. B. B. McCRAW.

The facts are sufficiently stated in the opinion.

RICE, CHILTON & JONES, for appellant.

SEALS, WOOD & ROQUEMORE, and NORMAN & WILSON,
contra.

PECK, C. J.—The appellee filed his bill in the court below against the appellant, for the partition and sale of the lands described in the bill of complaint, upon the

ground that the said lands could not be equitably partitioned or divided without a sale.

The bill states that plaintiff and defendant were tenants in common, each being entitled to an equal undivided half interest in the same as tenants in fee simple.

That on or about the first day of January, 1868, the defendant, by a verbal agreement, purchased plaintiff's interest in said lands. That by said agreement defendant was to pay plaintiff two hundred and seventy-five dollars, one-half in cash, and the other half on the first day of January, 1869; that under said purchase, defendant went into the possession of said lands, and cultivated them in the year 1868; that plaintiff, hoping and believing that defendant would substantially comply with his agreement, allowed defendant to take the exclusive control and possession of said lands during that year; that plaintiff had been always willing to abide by said contract for the sale of said lands, and had often called on and requested said defendant to perform his part of said agreement, but that defendant had refused to perform his part of said agreement. Plaintiff further states that the annual rent of said lands was worth one hundred and fifty dollars; that defendant had refused to account to plaintiff for the year 1868, although plaintiff had often demanded the same of defendant. The bill further states, that the joint tenancy of said lands by plaintiff and defendant was attended with serious inconvenience to both plaintiff and defendant, and that said lands could not be equitably partitioned or divided without a sale.

The bill prays an account for the rent, &c., and that defendant be decreed to pay the same to plaintiff, when ascertained; and then prays for a sale of said lands, for the purpose of partition between the parties, as should seem equitable and just, and for general relief, &c.

The answer of defendant on oath is waived.

Defendant answered the bill, and admitted the tenancy in common, and the verbal agreement for the purchase of the land, as stated in the bill, and his possession of the land under said agreement, &c., and denied all the other

allegations of the bill, and demurred to the same for want of equity.

Testimony was taken by plaintiff, and the case was submitted for a final hearing on the bill, answer, exhibit and proofs.

No notice seems to have been taken of the demurrer.

The chancellor decreed that the plaintiff was entitled to the relief prayed; that the plaintiff and defendant were tenants in common; that the lands could not be equitably partitioned; and, thereupon, decreed that the same should be sold, and directed an account to be taken as to the rent of the lands, &c.

The decree for the sale of the lands in this case must be reversed, on the authority of the case of *Deloney et al. v Walker et al.*, (9 Porter, 497.) On page 503 of said case the court say: "We can not suppose a case in which the lands of an adult can be sold by the decree of the chancellor, to make partition, without his consent." In this State, therefore, a court of chancery has no power to decree a sale of lands for partition, because they can not be equitably divided.

If the lands of tenants in common, of full age, are not susceptible of an exact division, an allotment may be made in unequal shares, with compensation for the inequality, by creating a rent or charge upon the land; or, if the land allotted to one tenant in common exceeds in value that allotted to the other, the court may compel the former to make compensation to the latter, for equality of partition.

The mode in which partition is effected in equity, may be seen in Adams' Equity, pages 552-3-4.

In the present frame of the complainant's bill, he is not entitled to simple partition. He should have stated and charged, that the verbal agreement of the defendant to purchase his undivided interest was void by the statute of frauds, and that there had been no such part performance as, under par. 6 of section 1862 of the Revised Code, would relieve it from the influence of that section.

The general rule, that partition will not be decreed in equity where the title is in dispute, applies only to a legal

title.—Adams' Eq. 519, note 1. If, on a bill for partition, the defendant wishes to avail himself of an equitable defense, as, for instance, a defense arising under a contract for purchase, he should, to entitle himself to his defense, file a cross bill; or, under our system, set it up in his answer in the nature of a cross bill, with a prayer for such relief as he may claim to be entitled to.—*Donnell et al. v. Mateer et al.*, 7 Iredell's Eq. R. 94. The verbal agreement for the purchase of the plaintiff's undivided interest, &c., is not a legal title; it is a mere equity at best.—*Ib.*

If, on the hearing, the chancellor shall be of the opinion that said verbal agreement entitles the defendant to relief, and to have the same specifically executed, then he should decree accordingly, and dismiss the plaintiff's bill for partition; but if, on the other hand, he shall be of the opinion that the said verbal agreement is void, then he should dismiss the cross bill, and proceed to decree partition, &c.

In addition to the decree for partition, if partition is decreed, the court may, if the case is a proper one for that purpose, proceed to decree an account for occupation, rent, &c.—Adams' Eq. 534-5.

The decree of the chancellor is reversed, and the cause is remanded for further proceedings, in conformity to this opinion. The appellee will pay the costs.

MCQUAID vs. POWERS AND O'DONNELL.

[ACTION TO RECOVER DAMAGES FOR NON-PERFORMANCE OF CONTRACT TO CONSTRUCT A HOUSE.]

Contract; what will support joint action; what attestation sufficient where obligor makes his mark.—A written contract for the construction of a house for a specified sum of money, signed by the parties, with an obligation beneath as surety for the faithful performance of the contract by the builder, signed, “Phillip ^{his} O'Donnell,” and attested by mark.

McQuaid v. Powers and O'Donnell.

two witnesses, whose names are written on the same page, but midway between those of the principals and the surety, was offered in evidence to support a suit for damages for non-performance of the contract prosecuted against the builder and surety jointly : *Held*, 1st. It was an attested instrument, the execution of which could be proved by one of the subscribing witnesses. 2d. The signature of the surety was shown to be complete by the testimony of the witness that the writing was executed by all the parties at the same time and place, and that he and the other witness signed it as witnesses with the assent of all the parties, and in their presence. 3d. As an obligation to answer for the default of another, a sufficient consideration was expressed. 4th. A joint suit against the defendants might be maintained upon it.

APPEAL from Circuit Court of Mobile.

Tried before Hon. JOHN ELLIOTT.

THIS was an action commenced by the appellant against the appellees jointly to recover damages for the non-performance of the contract evidenced by the following instrument :

“MOBILE, July 2d, 1866.

“Contract between John McQuaid, of the first part, and Robert Powers, of the second part.—It is hereby agreed that Robert Powers is to build for and deliver to John McQuaid, on or before 5th August next, a cottage residence, [here follows plan, dimensions, &c., of cottage.] The entire house to be built in good faith, according to plan and drawing furnished, for the sum of eight hundred dollars in current funds of the United States.

“In witness whereof we append our names.

{ U. S. I. } *Of the first part,* JOHN MCQUAID. [L.S.]
 { R. STAMP. } *Of the second part,* ROBT. POWERS. [L.S.]

Witnesses, { James Kelly,
 { W. L. Pinnix.

Securities. { We, the undersigned, do bind ourselves
 { hereby for the faithful performance of this
 { contract by Mr. Robert Powers, as securi-
 { ties.

his
 PHILLIP ✕ O'DONNELL."
 mark.

The defendant O'Donnell pleaded, “1st. The statute of frauds ; 2d. The general issue ; 3d. That he did not enter

into the contract and engagement set out in the complaint; and 4th. That said contract and engagement as to him is without consideration." And upon these pleas issue was joined. O'Donnell filed his sworn plea of *non est factum*, but this plea was withdrawn by him. Powers appeared, but filed no plea.

On the trial, the plaintiff offered in evidence the agreement, which is set out above, which was objected to by O'Donnell on the ground that the undertaking of Powers was absolute, but O'Donnell's was collateral and as a surety, and that they could not be joined in this action on that instrument.

This objection the court overruled.

The defendant O'Donnell then moved to exclude the agreement, on the ground that as to him it was not subscribed and executed, and attested by a subscribing witness, according to the statute, where a party signs by making his mark.

"Pending this objection, plaintiff introduced James Kelly, one of the witnesses named in the agreement, who testified that he saw O'Donnell affix his mark to the paper; that his name was written there by his daughter at his request; that it was acknowledged by him as his signature, as the surety for Powers in the contract, and also by Powers and McQuaid; that he subscribed it as a witness by their assent at the place where his name appears upon it, and that the other witness subscribed at the same time and place and in presence of all the parties; that O'Donnell received from McQuaid eight hundred dollars, and handed it to his daughter to keep for him; that the paper was then handed to McQuaid and a copy to Powers, with the plan of the house; that this occurred at O'Donnell's house in Mobile, where Powers boarded."

The court ruled that the signature of O'Donnell was not attested according to law, and that the evidence could not avoid the objection, and excluded the paper from the jury as to O'Donnell; to which ruling plaintiff excepted and took a non-suit, &c.

The various rulings of the court to which McQuaid excepted are now assigned as error.

GEORGE N. STEWART, for appellant.—The obligation was a sealed instrument.—Rev. Code, § 1585. But whether it was or not, was entirely immaterial, as the statute puts all written obligations which are made the foundation of the action on the same footing as sealed instruments, whether they be sealed or not. Section 2681 of the Revised Code provides that they shall be evidence of the duty for which they were given, and shall be taken as made on sufficient consideration, but may be impeached by plea and proof by the defendant.

The execution of such obligation is made by statute evidence without proof of execution, unless denied by plea on oath.—Rev. Code, §§ 2682, 2640.

In this case the execution had been denied by O'Donnell by plea, but that plea had been withdrawn.

It was excluded as to both defendants. One of them had made no objection to it.

But it was said that the attestation was not signed by the witness at the proper place as required by the statute. There is no statute on the subject; the one above cited applies to conveyances of lands.

Signing anywhere on the paper is sufficient.—Story on Contracts, § 863; Burge on Suretyship, p. 32. Even signing on the back is sufficient.—9 Mass. R. 314; 13 Johnson's R. 175.

The execution of the instrument as above stated stood before the court admitted, according to the statute, as it was made the foundation of the suit and was not denied on oath.

The written obligation was excluded also on the ground that there was a misjoinder—that the obligation of Powers was an original undertaking, and that the obligation of O'Donnell was a collateral undertaking.

In this we say the court again erred.

The obligation of O'Donnell was not collateral; it was

on his part, as well as on that of Powers, an absolute and original contract, not within the statute of frauds.

Both the writings constitute but one joint and several obligation in law.

The obligation of Powers was, that he should deliver the house on a certain day.

The obligation of O'Donnell was, that the house should be delivered by Powers on that day.

The two writings were simultaneously made, both delivered together by the two obligors to McQuaid.

The consideration was the same to both—eight hundred dollars paid. Powers accepted the consideration, and O'Donnell received the money. The obligation of both was that Powers should do the work and O'Donnell receive the pay. This was assented to by both.

Such contracts are treated precisely as if there was but one obligation signed by both jointly, and may be declared on as a joint and several promise.

That one signs as principal and the other as surety, makes no difference; they are nevertheless joint obligors. *White v. Howland*, 9 Mass. 314; *Nelson v. Dubois*, 13 Johns. 175; *Hunt v. Barnes*, 5 Mass. 358; *Burge on Suretyship*, 36.

The obligation of O'Donnell is not a collateral promise, because he has the fund for payment of the default which belonged to Powers.

A promise to pay out of funds of the principal debtor by the surety is not a collateral, but an original obligation. *Burge on Suretyship*, 28.

The evidence of the payment of the money to O'Donnell was proper, although by parol.

Extrinsic evidence may be given to ascertain the true import of a guaranty.—*Story on Contracts*, 410; 11 Johnson's R. 248.

The objection of misjoinder, under the authority of the cases above cited, does not exist. The pleadings in those cases show the light in which such contracts are treated; that is, the same as if only one joint obligation existed.

But the objection was not a proper one under the state of the pleadings. There was no plea in abatement for

misjoinder, nor was there any demurrer to the complaint.

The objection, even if available at first, was made at too late a stage of the case. A plaintiff should not be delayed by the withholding of such an objection.

ANDERSON & BOND, *contra*.—There was no error in the exclusion of the evidence offered as to O'Donnell—1st, Because it was a departure from the complaint, and did not correspond with its allegations; 2d. Because it was void as to O'Donnell under the statute of frauds, not expressing any consideration; and 3d. Because it was not signed or subscribed by O'Donnell as required by law.

1. The complaint declared on a joint undertaking. The contract attempted to be given in evidence is a full and distinct agreement, complete in itself with respect to plaintiff and Powers, but the undertaking of O'Donnell is collateral to the agreement in chief, and is not a part of it. Powers' agreement is complete without it. O'Donnell is a guarantor that Powers will perform his contract, and is not otherwise connected with it.—Chit. Plead. vol. 1, p. 44.

Story on Contracts, § 33*f*, p. 53, says: "In contracts of guaranty or suretyship, co-sureties may be either jointly or severally liable, according to the terms of their contract, but the surety is not jointly liable with the principal, his undertaking being collateral and secondary."

The case of *Phalen v. Dingee*, 4th ed. Smith N. Y. Rep. 379, is directly in point. See, also, *Le Roy v. Shaw*, 2 Duer, 626; *DeRidder v. Schermerhorn*, 10 Barb. 638; *Hall v. Farmer*, 2 Comst. 553; *Hicks v. Branton*, 21 Ark. 186; *Rowan v. Rowan*, 29 Penn. St. R. 181; *Worster v. Northrup*, 5 Wis. 245.

2. No consideration is expressed in the guaranty. The statute (Rev. Code, § 1862,) requires the agreement to express the consideration.

Burge on Suretyship, p. 30, says: "The statute requires the *agreement* to be in writing, and not merely the promise. If it was only necessary to show what one was to do, it would be sufficient to show the promise made by the defendant who was to be charged with it. But if this con-

struction were to be adopted, it would let in those very frauds and perjuries which it was the object of the statute to prevent."

It is true, other writings may be resorted to, but they must be other writings of the party to be charged, or to which he refers, or adopts.—*Wain v. Walters*, Smith's Leading Cases.

And this can not be done by parol, for parol evidence to connect them is not admissible.

3. The statute (Rev. Code, § 1,) is as follows: "'Signature' or 'subscription' includes mark when the person can not write, his name being written near it, and witnessed by a perssn who writes his own name as a witness."

It is attempted to make one attestation cover both instruments. This might possibly be done, if the attestation followed the whole, but it is appended to the original, and can not be extended to the one following.

The instrument must appear on its face to be signed according to law. If the door be opened to parol proof, the very mischief is let in which the statute of frauds seeks to prevent.

The statute of frauds (Rev. Code, § 1862,) is *emphatic* that the writing must be subscribed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized in writing.

This case differs from the ordinary proof of the execution of a writing. In such case we have the signature, and only its genuineness is to be established. In this case the signature is not found; and the effect of the proof would be to make a contract by parol evidence to bind a surety, which the statute of frauds forbids.

There is no signature to bind O'Donnell, if he were the principal, instead of a surety. Being a surety, the statute is very emphatic that the surety to be charged must have subscribed the agreement. Section 1 of the Revised Code requires the mark and the name of the party near it, and to be attested by a witness who writes his own name. Rules like this on the subject of the execution of deeds and wills are always strictly enforced.—See 5 Barr (Penn.)

p. 33, *Asay v. Hoover* ; see, also, *Graybill v. Barr*, 5 Barr, 441. *Flowers v. Bitting*, in MS., is directly in point.

4. The distinction between a direct and a collateral undertaking is shown by Mr. Serjeant Williams in his elaborate note to *Forth v. Stanton*, 1 Williams & Saund. 211. "The rule there laid down by him, and which has ever since been approved of, is, that the only test and criterion by which to determine whether the promise needs to be in writing, is the question whether it is or is not a promise to answer for a debt, default or miscarriage of another, for which that other continues liable."—Smith on Con., top page 116, citing many cases in notes on that and page 117.

In this case, the contract between the two principal parties is distinct and separate, and is complete by itself ; while the contract of O'Donnell is incidental, separate and conditional. He guarantees or binds himself not to do anything himself, but to answer that Powers shall faithfully perform his (Powers') contract. O'Donnell does not agree to do any of the work ; does not agree to join Powers in doing it. The contract is to build a house ; that is entrusted to Powers, and Powers is entrusted and charged with that duty. He is fully liable upon it. Must not O'Donnell's liability, therefore, be necessarily secondary and collateral?—See *Deslhonde v. Boykin & McRae*, 37 Ala. 583.

B. F. SAFFOLD, J.—The appellee, O'Donnell, is not liable in this suit, unless the plaintiff can show that there is some agreement in writing expressing the consideration subscribed by him, or some other person by him authorized in writing. His alleged undertaking is to answer for the default or miscarriage of another.

The writing offered in evidence has the name of O'Donnell affixed, by his mark, as a guarantor of Powers' performance of his contract. The signatures of the two witnesses, from their position on the paper, and the purpose, as expressed by the word "witnesses" merely written near them, appear to be an attestation only of the contract between McQuaid and Powers. One of these witnesses,

Kelly, testified that his attestation was intended to apply to the signature of O'Donnell as well as to the others; that the whole execution of the instrument was made at one time, in the presence of all the parties and the witnesses.

As the obligation of Powers was founded upon a valuable consideration, and the guaranty was given at the time when it was incurred, and entered into the inducement to the contract on the part of the plaintiff, the whole being evidenced by one writing, a sufficient consideration for the guaranty is expressed. It is not necessary that any consideration should pass directly from the party receiving the guaranty to the party giving it. If the party for whom the guaranty is given receive a benefit, or the party to whom it is given receive an injury in consequence of the guaranty, and as its inducement, this is a sufficient consideration.—1 Parsons on Contracts, 497; *Leonard v. Vredenburg*, 8 Johns. 29; *Bickford v. Gibbs*, 8 Cush. 156.

As to the authentication of the guaranty, no law prescribes the place on a written instrument where the signature of an attesting witness must be written, nor is any particular form of attestation required. The paper must indeed show that it is attested, and by whom. When this is made to appear, the instrument is to be authenticated by the testimony of such attesting witness. In case of a conveyance of land, the statute prescribes the facts which he must establish. So far as the validity of the deed is concerned, this probate may be made at any time. The testimony of Kelly is surely admissible to prove the execution of the contract by Powers. From it we learn that O'Donnell also executed the writing as a guarantor of Powers' performance. Shall his evidence be excluded against O'Donnell, because his name is not written in the customary place? If so, then the place where a contract or conveyance should be attested is more controlling than the attestation itself. We think the signature of O'Donnell is proven.

If O'Donnell, being sued on his obligation, might have obtained a summary judgment against Powers under sec-

tions 3070 and 3071 of the Revised Code, as he undoubtedly could have done as surety in any manner on the contract or instrument, there can be no error in joining the two as defendants in the first instance. Neither was liable, unless both were, for default in the performance of the contract.

The judgment is reversed, and the caused remanded.

JONES & CULLOM vs. KNOX.

[BILL IN CHANCERY BY WARD AGAINST SURETIES ON GUARDIAN'S BOND FOR SETTLEMENT OF THE GUARDIANSHIP.]

1. *Settlement of guardianship, when may be transferred to chancery court; who necessary parties defendant.*—It is a sufficient ground for transferring, at the suit of the ward, the settlement of a guardianship account from the probate to the chancery court, that the guardian was a certificated bankrupt, and died leaving no estate whatever; and in such a case there is no necessity for joining with the sureties a representative of the guardian as co-defendant, there being no administrator appointed.
2. *Liability of surety of guardian; provable in bankruptcy, and released by discharge in bankruptcy.*—The liability of the surety of a guardian is a contingent liability provable under section 19 of the bankrupt law of 1867. It is not of a fiduciary character, from which the discharge in bankruptcy of the surety does not release.

APPEAL from the Chancery Court of Montgomery.
Heard before Hon. A. C. FELDER.

THE appellee, a ward, on 23d June, 1869, filed his bill by next friend, against appellants, sureties on the bonds of his guardian. The facts are as follows: William Knox, in 1859, was appointed guardian of appellee, and qualified as such, with appellants as his sureties. On the 8th February, 1868, said guardian filed his accounts for an annual settlement of his guardianship, by which was shown a balance in his ward's favor of \$10,535.06, for which, on the 29th June, 1868, the

probate court rendered a decree. After rendition of said decree the guardian died, having become an adjudicated bankrupt previous thereto. Said guardian died insolvent, leaving no assets subject to administration, and no administration upon his estate has been granted or applied for.

Appellant Jones was adjudged a bankrupt, on his own petition, 24th February, 1868, and received his final discharge in bankruptcy 15th June, 1868.

Appellant Jones demurred to the bill, and assigned, among others, as grounds of demurrer, want of equity, and non-joinder of personal representative of guardian as party defendant; and plead his discharge in bankruptcy. The chancellor overruled the demurrer, and gave decree in favor of appellee, from which appellants appeal, and assign as error the overruling the demurrer and the decree of the chancellor.

CHILTON & THORINGTON, and S. F. RICE, for appellants.—

1. The foundation of complainant's claim to relief, is the indebtedness of William Knox, the guardian, and Cullom and Jones, the sureties of said guardian; the only indebtedness alleged, is the indebtedness which the bill and exhibit thereto show to have been actually existing on the 8th day of February, 1868.

Nothing is shown to have been done after the 8th day of February, 1868, and before the filing of complainant's bill, which changed in any manner *the nature or character* of the alleged liability against the sureties. The decree of the probate court of June 29th, 1868, *allowing the guardian's account, previously filed*, did not change *the nature or character* of the liability of his sureties.

2. The nature or character of the liability of a surety of a guardian appointed in Alabama, must be determined by the statute of Alabama. The effect of a report, or return, or account filed by such guardian, in the probate court which appointed him, as well as the ascertainment by such court of the amount due by such guardian upon any settlement by him in that court, must be determined by those statutes.

These positions are the plain sequences from the following unquestionable principle, to-wit: "The legislature (of Alabama) is authorized clearly, by law, to provide that certain consequences shall flow from certain acts; or, as in this case, that the ascertainment of the liability of the principal shall fix the liability of the sureties; but the facts and circumstances out of which this relation (of principal and surety) arises, is, and must always be, a matter for judicial determination."—*McClure v. Colclough*, 5 Ala. 69, 70; *Price v. Cloud*, 6 ib. 248; *Robertson v. Coker*, 11 ib. 466.

Sureties who become such under the statute are bound by them as part and parcel of their contract; for these statutes are, in truth, part and parcel of their contract.—*Atwoods v. Wright*, 29 Ala. R., and cases there cited.

3. The inquiry that must govern the present suit, is then reduced to this: Upon the facts and circumstances proved in this suit, was the liability of the principal (Wm. Knox) of such nature and character (had it not been fiduciary) as to be provable under the bankrupt law? This inquiry is of easy and certain solution.

4. Jones was discharged in bankruptcy from all debts that *existed* on the 24th of February, 1868. The question, then, is not whether an indebtedness had been so ascertained to be due by the guardian before said 24th February, 1868, as that a suit could have been maintained at or before that day against the sureties, but whether Knox, the guardian, had up to that day received a greater amount of money from the estate of his ward than he was able to return to him. If the indebtedness of Knox to his ward *existed*, it matters not whether it was *ascertained* or not. It was not Jones' duty to have it ascertained, but the duty of the party who now seeks to charge him with it. The bankrupt law gave him the right to have it ascertained, and in this differs from the old bankrupt law; having the right, his refusal or failure to exercise it, can only operate against himself. Jones' rights can not be prejudiced thereby.

5. The decisions above cited also show that, *under our statutes*, the sureties of a guardian are so peculiarly affected by his acts, as to make it manifestly inequitable to permit

a complainant to force the sureties to litigate the question of liability without the aid of the guardian, if living, or of his representative, if he be dead. A complainant can always make the guardian or his personal representative a party defendant under our practice; and he ought to be compelled to do so. Especially ought he to be so compelled, when, as here, he seeks to have the *final settlement* of the guardianship transferred from the probate to the chancery court. To any such *final settlement*, the guardian or his personal representative is not only a proper, but a necessary party. Obviously, he is a necessary party to such settlement in the probate court, and must be so deemed when such settlement is transferred to the chancery court.

MARTIN & SAYRE, *contra*.—1. The demurrer, for want of proper parties, has already been overruled, and there is nothing in any of the other causes of demurrer.

One of the defences is, that Jones was discharged as a bankrupt, and thereby released from his liability on the bond. This depends upon whether there was any debt against him at the time of filing his application for a discharge. His discharge shows that he was “discharged from all debts which by said act are made provable against his estate, and which existed on the 24th of February, 1868.” William Knox never made any final settlement of his guardianship. On an annual settlement made the 3d of February, 1868, a balance was found against him of \$10,535.06. But there was no liability fixed on the sureties by this annual settlement. The liability of the surety is not established until there is a final decree, and a failure by the guardian to satisfy that decree.

There was no demand against Jones in February, 1868, on account of his suretyship on said bond. There was no default at that time by his principal. No demand could at that time have been enforced against Jones; it was an amount for which Knox was individually liable.—Owen on Bankruptcy, 161–5; Hilliard on Bankruptcy, 303, 304, 305;

Turner v. Esselman, 15 Ala. 690; *James on Bankruptcy*, 85; 6 Hill, 252.

2. The argument of appellant's counsel, that Jones was discharged from his obligation as surety by his bankruptcy, is not sustained by the authorities which he cites. Section 19 of the bankrupt act applies only to such liabilities, contingent in their character, which have been contracted by the bankrupt *himself*, and has no reference to security debts.

The bankrupt act of 1841, § 5, contains this provision: "All creditors whose debts are not due and payable until a future day, all annuitants, &c., sureties, endorsees, bail, or other persons having *uncertain or contingent demands* against such bankrupt, shall be permitted to prove," &c.

This language is certainly as strong as that contained in the act of 1867; and all the authorities hold that the liability of a security on a guardian's bond is not such a demand against the bankrupt as can be proved. (See authorities before cited.) In the case of *Turner and Wife v. Esselman*, 15 Ala. 695, Judge Chilton says: "Until the guardian made default, there was clearly no demand which was provable against the surety, and I apprehend it was hardly contemplated by the act, that the court granting the discharge should institute an inquiry as to the extent of the principal's default." In this opinion Judge Dargan agrees with him. The point stated by Judge Chilton is the precise point in this case; and the law as stated by him is amply sustained by all the authorities.

The account of William Knox was allowed on the 29th of June, 1868, being the only account ever filed by him in reference to said estate. On the 15th of June, 1868, Jones is finally discharged from all debts and claims which were provable against his estate on the 24th of February, 1868. Certainly the allowance of Knox's account created no claim against the estate of Jones; that account was not allowed on the 24th of February, 1868. If the proposition had been made to prove it as a claim against Jones, the answer would have been that no liability had been

fixed on either Jones or Knox; that the account was evidence only; that Knox had to account for the balance thus found against him. It was no evidence that he had to *pay* that amount of money; it was evidence only that he had to *account* for that sum. No man could have known that Jones would ever be called upon for that money. The condition of the bond is, "if the said William Knox shall well and truly perform all the duties which are or may be required of him by law as such guardian." How could it have been ascertained at that time what duty Knox had neglected? or that he had neglected any? Or how could the damages have been ascertained? No liability attached to Jones until Knox's default had been found by law. It was not yet fixed; that is the question now being tried in this court. The liability of Jones depends upon the liability of Knox. If it should be shown in this case that Knox had properly administered the estate, and had properly invested the money, no liability would attach, although the money was lost. It can not be ascertained, until this case is determined, whether Knox is liable at all as guardian. The account is *prima facie* evidence against him, but he may shew what disposition was made of the money. Such inquiries certainly could not be made in proving a debt against a bankrupt estate. In the language of Judge Chilton, in *Turner v. Esselman*, *supra*, "This would in many cases be impracticable, and would have rendered the law in such cases nugatory, by involving the court in inextricable difficulties and delays." See Hilliard on Bank. 304, § 103; *The Owners of St. Martin v. Warren*, 1 Barn. & Ald. 491.

3. Knox was guardian when Jones was discharged as a bankrupt; he had committed no default then; but according to the argument of counsel, his sureties would cease to be his sureties whenever they thought proper to go into bankruptcy. The law in this State is, that the sureties are bound until their successors are qualified. Who has been Knox's surety since Jones' bankruptcy? There is no order of court relieving him. The suretyship of Jones continued in spite of his bankruptcy, and it was impossible

for him to relieve himself of it, except in the way pointed out by statute. His liability is continuous, and goes on from day to day.

4. The object of the bill is to obtain a final settlement of the guardianship, and to ascertain the extent of the liability of Knox, and at the same time to fix the liability of the sureties, the only parties now in being.

The jurisdiction of the court of chancery in such cases is so well established that no authority need be cited on that point.

B. F. SAFFOLD, J.—The purpose of the bill filed by the minor, was to obtain a settlement of his guardianship in the chancery court. The sureties of the guardian were alone made defendants on the allegation that the guardian had died insolvent and bankrupt, leaving no assets whatever.

A demurrer to the bill, on the ground that a representative of the deceased guardian was a necessary party defendant, was properly overruled. Equity never requires the performance of a useless ceremony. The appointment of an administrator would have caused some expense, while it could afford no possible advantage to the sureties.—*Frowner v. Johnson*, 20 Ala. 477; *Vanderveer v. Alston*, 16 Ala. 494.

The allegation also showed the necessity of the chancery jurisdiction, because the probate court was only authorized to settle the accounts of the guardian with his representative.—Revised Code, §§ 2324, 2326.

Is the defendant Jones' discharge in bankruptcy a protection against his liability as surety on the guardian's bond? It absolved him from all debts and claims provable against his estate which existed on the 24th of February, 1868. An account filed for settlement by the guardian on the 8th of February, 1868, showed a liability existing at that date against him as great as the amount recovered by the decree. No breach of trust is alleged or proved to have been committed after the filing of Jones' petition in

bankruptcy. Unless the liability of the surety is fiduciary, the discharge released him from it.

In *Turner v. Esselman*, (5 Ala. 690,) a discharge in bankruptcy of the surety of a guardian under the bankrupt act of 1841, was held not to protect him against a statute judgment obtained after his discharge, on the ground that the debt was not provable, and, as declared by Judge Dargan, that it was a fiduciary debt. The act of 1867 is essentially different in this respect from that of 1841. The 19th section includes, among the debts and claims provable, all cases of contingent debts and *contingent liabilities* contracted by the bankrupt, and not therein otherwise provided for. The creditor is allowed to "make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the final dividend; or, he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained."

The liability of the sureties of a guardian attaches whenever the guardian receives property of his ward, and becomes a debt on, and to the extent of, the guardian's default, with a right of action accruing in law against them on the rendition of a decree or judgment ascertaining the fact and amount of the default.—*Ward & Davis v. Yonge, adm'r*, January term, 1871. It is a contingent liability, within the comprehensive meaning of section 19 of the bankrupt law of 1867, capable of being fixed, or having its present value ascertained by the modes therein indicated. And it is the contract imposing the liability from which the party is relieved.

The exception from discharge, under the 33d section of the law, of debts created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, from its very comprehensiveness, conveys, as a reason for the exception, the idea of some moral turpitude or culpable neglect of duty. The sureties of a guardian have no control of his conduct.

Stringer v. Echols et al.

Their obligation is entirely different from his. They undertake to pay money on his account, while he, in addition, engages to be honest and faithful and careful. It is for failure in this latter respect that the law refuses to release him from his debt. The liability of the sureties was not of a fiduciary character.

The decree is reversed, and the cause remanded.

To an application for re-hearing, the following response was made :

SAFFOLD, J.—We think it is the contract or obligation to be liable for the default of the guardian that the discharge in bankruptcy relieves from, and not the mere liability when fixed. There is no difficulty in ascertaining the amount of the claim to be filed for allowance. It might be done by calling the guardian to a settlement.

A re-hearing is denied.

STRINGER vs. ECHOLS ET AL.

[APPEAL FROM ORDER SETTING ASIDE STATUTORY JUDGMENT ON FORFEITED
REFLEVY BOND, &C.]

1. *Judgment on motion affecting adverse party, made after final judgment; when erroneous.*—After final judgment, the parties are not presumed to be in court; therefore, any motion made in the cause, after that time, materially affecting the interests of the adverse party, must be on notice, otherwise the judgment will be erroneous.

APPEAL from the Circuit Court of Henry.
Tried before Hon. J. McCaleb Wiley.

The opinion contains the facts.

J. A. CORBITT, and SEALS & WOOD, for appellant.
W. C. OATES, *contra*.

PECK, C. J.—In October, 1866, the appellant commenced his suit, in the circuit court of Henry county, against the appellee, Echols, by summons and complaint, founded on a promissory note, and then sued out an ancillary attachment, and had the same levied on defendant's horse, which was replevied by defendant, and a replevy bond given, with the other appellees as his sureties.

At the fall term of said court, in the year 1867, the plaintiff recovered judgment, and on the 18th day of November, in the same year, the said replevy bond was returned forfeited, by the sheriff.

At the fall term, 1868, two of the sureties on the replevy bond moved the court to set aside the statutory judgment on said bond, which motion was granted, and the said bond, by the order and judgment of the court, was declared to be null and void, and the plaintiff was taxed with the costs. From the record, it does not appear that the plaintiff had any notice of said motion, and the minute entry fails to state that he appeared. The plaintiff has appealed to this court, and assigns the said order and judgment of the circuit court for error.

After final judgment, the parties are not presumed to be in court; therefore, any motion made in relation to the cause, after final judgment, that materially affects the interest of the adverse party, must be on notice; otherwise, the judgment of the court will be erroneous.—*Yonge v. Broxton*, 23 Ala. 684; *Murray & Durand v. Tardy*, 19 Ala. 710. As the record fails to disclose that the appellant had notice of the motion in this case, the judgment of the circuit court declaring the replevy bond null and void, and taxing him with the costs, is reversed, and the cause is remanded for further proceedings.

MOBILE & GIRARD RAILROAD CO. *vs.* PREWITT.

[ACTION AGAINST COMMON CARRIER FOR FAILURE TO DELIVER GOODS.]

1. *Railroad companies are common carriers.*—A railroad company in this State is a common carrier, and whilst the goods are in *transitu* it is liable to all the responsibilities of common carriers.
2. *Same ; when liability of, as common carrier, ceases.*—But where the bill of lading shows that the goods transported were shipped to the owner as consignee, “care of the railroad company,” to be delivered at a station on the railroad, if the goods are transported with the usual expedition, and the owner or his agent is not at the depot designated for the delivery at the time the goods arrive, ready to receive them, the goods may be deposited in the warehouse of the company, and from such deposit the liability of the company as common carrier ceases.
3. *Same ; when responsible as warehouseman for hire.*—Goods so deposited must be kept by the company under the responsibility of warehousemen for hire, whether actual storage be charged or not, and the company must act without fraud or bad faith.
4. *Same ; when charge that carrier is liable only for loss occasioned by gross negligence, is correct.*—In a suit for damages for loss of the goods in such a case, if there are two counts in the complaint, the one on a contract of common carriers, and the other on a contract of a warehouseman without hire, a charge asked by the defendant under the latter count, that the company is only responsible for losses and injuries occasioned by gross negligence, is proper, and should be given.

APPEAL from Circuit Court of Bullock.

Tried before Hon. J. McCaleb Wiley.

The facts are sufficiently stated in the opinion.

RICE, SEMPLE & GOLDTHWAITE, for appellant.

J. N. ARRINGTON, and STONE, CLOPTON & CLANTON, *contra*.

PETERS, J.—This is an action for damages instituted by the appellee against the appellant as a common carrier. There are two counts in the complaint, which are as follows :

“The plaintiff claims of the defendant, a corporate body, two hundred and eighty-three dollars and fifteen cents, as damages for the failure to deliver certain goods, namely, two boxes of merchandise, containing sundry ar-

ticles of dry goods, received by said Mobile & Girard railroad company as a common carrier, to be delivered to the plaintiff at station No. 6 on said railroad, for a reward, which he failed to do.

"And the plaintiff claims of the defendant, a corporate body, five hundred dollars as damages, for that heretofore, to-wit, on the 20th day of October, 1869, (?) the said defendant, at his special request and instance, had the care of certain other goods and chattels, to-wit, two boxes of merchandise, containing sundry articles of dry goods, the property of the plaintiff, and thereupon it then and there became and was the duty of the said defendant, whilst he so had the care of the said goods and chattels, to take due and proper care thereof; yet the said defendant, not regarding his duty in that behalf, did not nor would, whilst he so had the care of the said last mentioned goods and chattels, take due and proper care of the same, but wholly neglected to do so, and took such bad care thereof that afterwards, to-wit, on the twentieth day of October, 1869, (?) became and were greatly damaged and injured, and wholly lost to the said plaintiff, to the damage of the plaintiff as aforesaid."

To this complaint the defendant pleaded "not guilty, in short by consent, with leave to give in evidence anything which, if specially pleaded, would constitute a bar to the action." And the plaintiff joined in issue, "with like leave to give in evidence anything which, if specially replied, would be a good replication."

Upon this issue the parties went to trial by a jury. There was a verdict for the plaintiff for three hundred and fifty-five dollars and sixty-five cents. And a judgment for this sum was rendered, and for costs. From this judgment the defendant in the court below brings the cause by appeal to this court.

On the trial in the court below, the defendant in that court took a bill of exceptions. From this, it appears that the plaintiff below introduced evidence tending to show that he had purchased in the city of New York the articles and goods referred to in the complaint; that said goods

were "billed" to plaintiff at an aggregate cost of two hundred and eighty-two dollars and sixty-five cents; that this purchase was made on September 28th, 1868; that the goods were properly put up in separate packages and shipped on September 29th, 1868, to the plaintiff at Midway, Alabama, *via* Savannah, Georgia, care of defendant, and to be delivered to plaintiff at defendant's station No. 6, as shown by the bill of lading. In this bill of lading are the following stipulations:

"And it is further expressly stipulated, that in case any claim shall arise from any damage or injury to the articles mentioned in this bill of lading while in *transitu*, and *before* delivery, the extent of such damage or injury shall be adjudged in the presence of an officer of the railroad, before the same (is) removed from the station. And the amount of such claim, when so ascertained, shall (be) preferred at the office of the chief of transportation of the road which shall have delivered the goods, within ten days after such delivery. And in case such claim, whatever it may be, shall not be preferred within the time and at the place hereinbefore designated, such loss or damage shall be held to be waived. And it is further stipulated, that in all cases of loss of such goods or merchandise, the amount of claim and damages shall be restricted to the cash value of such goods or merchandise at the port of departure at the time of shipment, and shall be presented as above, within ten days after the proper time for their delivery in due course; and that all claims for partial loss or damage shall be ascertained and adjusted upon the same basis of value."

It was shown in connection with this bill of lading, that the goods sued for reached said station No. 6 at about three o'clock P. M. on the 10th day of October, 1868, and were ready for delivery in about one half of an hour thereafter. No one was there ready to receive them, and they were stored in the warehouse of the railroad company at that station, and carefully kept without hire for delivery to the owner when called for. On the morning of the 17th day of October, 1868, the warehouse aforesaid was accidentally burned, and two boxes of the goods mentioned in

the bill of lading were destroyed by the fire, in spite of every effort made by the servants and agents of the said railroad company to prevent it. The goods were not called for until after the burning, and that portion which had been burned up and destroyed could not be delivered. The transportation of such goods on the railroad was for hire. It was shown by the defendant that the goods had been diligently and carefully kept by the agents of the company, in said warehouse, until they had been destroyed by said burning, on the night of the 17th day of October, 1868, as above said. It was also shown that the plaintiff had been in the habit of having goods sent to said station No. 6, and receiving them there, for some several years; that it took goods shipped from New York city to said station about ten or twelve days to reach said station; and that the warehouse there was a good, secure, substantial building, and was burned without any fault of said railroad company or its agents. It was also shown that said plaintiff resided about twenty miles away from said station No. 6 on said railroad. This was the substance of the testimony given. On this testimony the court gave a number of charges, some for the plaintiff and some for the defendant. But it is only necessary to notice those which were excepted to by the defendant, and those which were asked by the defendant and refused by the court. These charges were all asked in writing.

The first charge asked by the plaintiff and given by the court, and excepted to by defendant, was in these words: "If the jury believe from the evidence that the defendant was a common carrier, and as a common carrier received the goods of the plaintiff described in the complaint, to be delivered to plaintiff at their point of destination for a reward; that the goods arrived at their point of destination; and that after said arrival there they were destroyed by fire, then the defendant is responsible as a common carrier, that is, an insurer against all losses, except those caused by the acts of God or the public enemy." This charge was excepted to by the defendant. The defendant, among other charges which were given, asked the follow-

ing, which were refused : 7. "That upon the second count, the defendant can only be made liable for gross neglect." 8. "That if the jury believe from the evidence that the goods sued for did reach their destination, and were deposited in the warehouse or depot of defendant, and were made ready for delivery, then the liability of defendant as common carrier ceased, and the liability of defendant as a bailee without hire began, provided defendant did not charge storage on said goods." 9. "That the liability of a bailee without hire is only for gross negligence."

Railroad companies in this State are common carriers, and so long as they are engaged in the office of common carriers their liabilities require the utmost strictness in the performance of their duties.—*Selma & Meridian Railroad Co. v. Butts & Foster*, 43 Ala. 355 ; *Mobile & Ohio Railroad Co. v. Hopkins*, 41 Ala. 486 ; 2 Redf. Law of Railw. 9, § 152. Then, one of the chief questions in this case is, when do the extraordinary liabilities of railroad companies as common carriers end? It has been very well said by this court, in a carefully considered opinion, that "it must be remembered, that in contracts for the carriage of goods, the obligation is not all on one side. It is as much a part of the contract that the owner or consignee shall be ready at the place of destination to receive the goods when they arrive, or within a reasonable time thereafter, as that the carrier shall transport and deliver them." And, "If goods transported by railroad are not called for by the consignee when they arrive at their destination, and are then deposited in the warehouse of the company without additional charge, until the owner or consignee has a reasonable time, by the exercise of proper diligence, to remove them, the liability of the company as carriers is at an end. And if after this, the goods remain in their warehouse, they are responsible only as keepers for hire."—*Ala. & Tenn. Rivers Railroad Co. v. Kidd*, 35 Ala. 209. This opinion was announced in 1859, now about twelve years ago. And subsequent experience has not shown that the principles upon which it was made to rest have proved to be unsafe or unjust. In this case, the goods were consigned to the owner,

"care M. & G. R. R.," and a place was appointed for their delivery. This is the contract of transportation. The letters above named can only mean the Mobile & Girard railroad. To deliver the goods to the owner, or according to his direction, was sufficient to put an end to the contract of transportation, which also would put an end to the liability of the railroad company as common carriers. Story Bailm. § 509; 1 Pars. Cont. p. 743, bottom. Here, then, there was a delivery as the owner had directed; that is, to the railroad company itself, or to its agents, which was the same thing. This delivery was sufficient to put an end to their contract as common carriers. In this view of the law, the first charge above quoted was incorrect.

When the railroad company thus undertakes to receive and keep the goods for the owner, it is an assumption of control that can not be treated as a mere bailment without hire. For it can not be in justice said that such a bailment is without hire, though no charges for storage are demanded. The accommodation itself is one that has a strong tendency to bring business to the company, because goods transported by them thus find a safe deposit until they can be removed by the owner. Thus, too, the company is paid for the use of its depots by the increase of its business. And when they assume thus to act as warehousemen for their customers, they must be treated as warehousemen for hire. And as the warehouse system in connection with the great business of transportation is a powerful inducement to increase the amount and value of the transportation itself, they must be regarded as warehousemen demanding and receiving a very liberal reward. They are therefore bound to use ordinary diligence in keeping the goods deposited in their station-houses or depots; and also to act without fraud or bad faith.—Story Bailm. §§ 3, 62; 1 Pars. Cont. 700, bottom.

But the second count of the plaintiff's complaint is a count on a contract of bailment as a warehouseman without hire.—2 Chitty on Pl. Such a contract imposes on the bailee a liability for gross negligence only, as the bailment is for the benefit of the bailor alone.—1 Pars. Cont.

Jackson v. Dinkins.

pp. 649, 650, bottom ; Story Bailm. §§ 3, 62. The court then, ought to have given the 7th, 8th and 9th charges, asked by the defendant, as above set out, under the form of pleading adopted in this case.

The judgment of the court below is reversed, and the cause is remanded for a new trial.

JACKSON *vs.* DINKINS.

[APPEAL FROM ORDER GRANTING MANDAMUS.]

1. *County, claims against ; what must be allowed by commissioners court.*

A jury certificate is not such an authenticated claim against the county as may be paid by the county treasurer without the previous allowance of the commissioners court.

APPEAL from Circuit Court of Montgomery.

Tried before Hon. J. Q. SMITH.

THE proceedings in this case were instituted in the circuit court by Dinkins, the appellee, by a petition for *mandamus*, against the appellant, as the county treasurer of Montgomery county, to compel him to pay a jury certificate.

At the January term, 1869, Dinkins was regularly summoned, drawn and sworn as a petit juror, and served as such for five days. He received from the clerk a regular certificate in due form, certifying that he was entitled to receive for his services and mileage the sum of \$7.90. This certificate Dinkins presented to Jackson, the county treasurer, and demanded its payment. Jackson admitted that he had funds to pay jurors, as such, for their services when properly audited, but refused to pay the jury certificate, because Dinkins presented no authority or warrant from the probate judge, as *ex-officio* judge of the court of county commissioners, for the payment of said claim. Jackson

having waived the issue of a rule *nisi*, &c., the court granted a peremptory *mandamus*, in accordance with the prayer of the petition, and hence this appeal.

A. J. WALKER, and HAMILTON MCINTYRE, for appellant.

1. It is, beyond dispute, the *general* rule of law in this State, that "*all claims*" chargeable against a county, (unless specially excepted by statute,) must first be "*audited, examined and allowed*" by the court of county commissioners; and the judge of probate must give the "claimant a *warrant* on the county treasurer" for the same, before the county treasurer is authorized to pay.—Rev. Code, § 832, subd. 3; §§ 907, 926.

2. Is a "juryman's certificate" claim excepted from the above general rule by any law of Alabama?

Shall the fact that it is the custom in *some* counties for county treasurer's to pay such claims before they are "audited, examined and allowed" and warrants issued therefor, be permitted to overturn the only means provided by law to prevent collusion and fraud from being practised by dishonest clerks and their confreres upon the public treasuries?

Does the fact that the last clause of section 4345 of the Revised Code, (in these words, to-wit: "*Which certificate is receivable in payment of any county dues, and payable out of the county treasury,*") requires a juryman's certificate to be received by the treasurer of a county in payment of any dues, make such claim an exception to the general rule? It is a well settled rule, that two statutes, *in pari materia*, must be construed together, and both given effect. Will not this rule be violated whenever a county treasurer is allowed to pay a juryman's certificate before it is audited, examined, and a warrant issued therefor?

It is true, the words "receivable in payment of *any* county dues," would seem to give these certificates a sort of circulatory or current character, inconsistent, perhaps, with the scrutiny and delay to which they are subjected when "audited and examined" by the commissioners court. Yet, are not "warrants" equally as current, perhaps more so

than a mere certificate unapproved by the proper authority?

But, be that as it may, the clause in these words, "receivable in payment of *any* county dues," was repealed, and still stands so, as to Montgomery county, and therefore can not be considered in this cause, because taxes and licenses were, and are, the only dues payable to the county. See Acts of 1868, p. 253, section 2 of "An act to empower the commissioners court of Montgomery county to issue bonds," &c.

CHILTON & THORINGTON, *contra*.

B. F. SAFFOLD, J.—Is a jury certificate such a claim against the county as may be paid by the county treasurer without the previous allowance of the commissioners court? There would be no difficulty in the question, were it not for the provision in section 4345 of the Revised Code, making them receivable in payment of county dues. The certificate of the clerk is not an adjudication by any court of the correctness of the claim and the liability of the county. Unless its receivability in payment of county dues is inconsistent with its presentation to the commissioners court, it must be presented and allowed before the treasurer is authorized to pay it, because all claims against the county must be adjudicated by some competent judicial tribunal before they can be paid.—Rev. Code, §§ 926, 907; *Dale County v. Gunter*, January term, 1871. Upon the allowance of a claim by the commissioners court, the probate judge is required to give the claimant a warrant upon the treasury for the amount allowed.—Rev. Code, 907. Claims so allowed necessarily become merged in the warrant, if it be taken, otherwise, there would be two vouchers for the same debt. But suppose the claim is a jury certificate, and the complainant prefers to retain it in order to settle with the tax collector. There is no prohibition against his doing so, and thus its capability of paying county dues is undiminished; his choice of using it either way is unimpaired.

The inference against the necessity of presentation and allowance authorized by section 4345, is at least neutralized by the contrary one that may be drawn from the "Form of keeping County Treasurer's Accounts," on page 259 of the Revised Code, which is a law. There the "Register of Claims" contains a jury certificate with the date of its allowance.

Ample redress is provided against the treasurer, if he fails to pay on demand an allowed claim.—Revised Code, § 930.

The judgment is reversed, but the cause is not remanded. The appellee will be charged with the costs of this court and of the circuit court.

BRIGMAN ET AL. vs. THE STATE.

[STRIKING CASE FROM DOCKET.]

1. *Supreme court; when has no jurisdiction to determine cause.*—Where the transcript of the record and proceedings of the lower court were filed in the supreme court, it no where appearing, either in the record or clerk's certificate, that an appeal had been taken, there being no appeal bond or security for costs of the appeal, the supreme court ordered the case stricken from the docket, as one of which it has no jurisdiction.

Brigman and others have filed in this court a transcript of the record and proceedings upon a forfeited undertaking of bail in the circuit court of Dallas, from which it appears that Brigman, having been indicted for forgery, he and others entered into an undertaking of bail for his appearance at the next term of court. Failing to do this, judgment *nisi* was rendered against the obligors on said undertaking of bail, which was afterwards made final. The clerk certifies simply that the transcript is a full and complete transcript of the record and proceedings in the

 Thornton v. Bledsoe et al.

circuit court in the matter of the undertaking of bail, and proceedings and judgment thereon. There is no appeal bond, nor any evidence whatever in the record that any appeal has been taken.

The clerk having docketed the case, the Attorney-General now submits the same on motion to dismiss it out of this court.

JOHN W. A. SANFORD, Attorney-General, for motion.

— — — *contra.*

PECK, C. J.—On looking into this transcript, we find no where in the record, or the certificate of the clerk of the circuit court, any evidence that an appeal was taken, or any appeal bond, or security for the costs of an appeal, given, as required by § 3509 of the Revised Code; consequently, the case is not properly in this court, and we can take no jurisdiction of it, either to hear it, or to dismiss it as an appeal irregularly and improperly here. The only order we can make is, to direct the case to be stricken off the docket. This we must do to get the case out of our way.

Let the case be stricken from the docket, because no appeal appears to have been taken.

THORNTON vs. BLEDSOE ET AL.

[APPEAL FROM ORDER DISSOLVING INJUNCTION.]

1. Act of October 10th, 1868, "for the protection of bona fide purchasers for valuable consideration;" construed.—The act of the general assembly "for the protection of bona fide purchasers for a valuable consideration," is not a mere registration act for the protection of innocent purchasers without notice, but it is a law regulating the liens of judgments by prescribing the conditions upon which they shall be created and preserved.

2. *Same*; "*bona fide purchase*" defined.—A *bona fide* purchase for valuable consideration does not embrace, as essential ingredients, want of notice and the payment of purchase-money.

APPEAL from the Chancery Court of Bullock.

Heard before Hon. B. B. McCRAW.

IN October, 1867, one Walker recovered judgment in the circuit court of Bullock against John W. Bledsoe, complainant's vendor, and another person. Execution issued on this judgment November 16th, 1867, and was returned without levy on the 17th of January, 1868, endorsed by the sheriff, "returned of law."

On the 1st day of November, 1869, complainant purchased certain lands mentioned in the bill from the defendant in execution, Bledsoe, and then went into possession, and has so continued ever since, and paid for the same \$500, on the 26th November, 1869, and the remainder of the purchase-money on the 25th day of January, 1870, at which time she received a fee simple deed to the lands thus purchased. On the 21st of December, 1869, (no execution having issued since the 17th January, 1868,) Walker caused the issue of execution on his judgment, which was levied on property of Bledsoe, and claimed by him as exempt.

After the Spring term, 1870, of the circuit court, another execution issued on said judgment, and was levied by the sheriff on the lands purchased by complainant, as the property of the defendant in execution, Bledsoe. The bill is filed to enjoin the sale of the land, and to correct the deed of Bledsoe as to certain misdescriptions of the lands conveyed, and which is not necessary to be further noticed. Bond being given, the injunction issued as prayed for.

The defendant Walker demurred to the bill—1st. Because the bill shows that at the time the purchase-money was paid, the judgment in favor of Walker was a lien which still exists, and the legal title to the land was in said Bledsoe; 2d. The bill shows that before the purchase-money was paid, the execution issued on the judgment described in the bill had acquired a lien on the land; 3d. The bill shows that respondent had a lien on the land at the date

of the purchase, and there is no offer to pay the purchase-money which was unpaid at the time the lien accrued.

The chancellor sustained the demurrer, dissolved the injunction, and dismissed the bill as to the respondent Walker, and hence this appeal.

C. J. L. CUNNINGHAM, for appellant.—Mrs. Thornton having purchased at a time when, not only an entire term, but over two entire years had elapsed and intervened between the return of the original execution and the delivery of the *alias* to the sheriff, no lien could attach as against her by virtue of the issue of said *alias*, unless she had actual notice of the process. There was no *lis pendens* as to her, either in said judgment or the writs of execution issued thereon.—Bouv. Law Dic. title *Lis Pendens*; 1 Vern. 459; *Center v. P. & M. Bank et al.*, 22 Ala. 757.

The bill shows that Mrs. Thornton went into possession of the land at the time of her purchase. If, therefore, the issue of the *alias fi. fa.* could have the effect to revive the lien, or to create a new lien in favor of appellee, he would be in no better position as to Mrs. Thornton than he would have been had he been simply a purchaser at the time from Bledsoe. The law would have charged him as purchaser with notice of Mrs. Thornton's equities, and that she was in possession under such claim as a court of equity would uphold and enforce as against Bledsoe or any one holding under him. It was therefore obligatory upon the plaintiff in execution, if he desired to enforce the collection of his judgment out of the lands purchased by Mrs. Thornton, to have inquired into the nature of her possession and title, and notified her of his intentions. His third ground of demurrer is, therefore, insufficient. This view of the case is sustained by the authority last above cited, *Center v. P. & M. Bank et al.*

We raise the point, under the construction of the act of 1868 for the protection of *bona fide* purchasers, that after a sale, *bona fide* as to the purchaser, under the circumstances of the purchase in this case, no lien attaches or is revived by the issue of subsequent writ or writs of execution.

This ought certainly to be the force and effect of the act where notice of the revival of the lien is carried home to the purchaser.

NORMAN & WILSON, and DAVID CLOPTON, *contra*.

B. F. SAFFOLD, J.—The statute approved October 10th, 1868, “for the protection of *bona fide* purchasers for a valuable consideration,” is not a mere registration law, the essence of which is notice.

It declares that the liens of judgments created or preserved by certain acts and sections of acts, and by the Revised Code, shall be null and void against purchasers in good faith for valuable consideration, in certain cases. One of these cases is, when the property subject to the lien is purchased after the return of one execution and before the delivery of another to the sheriff, an entire term intervening.

Want of notice and payment of the purchase-money are not necessary ingredients of a purchase in good faith for valuable consideration. The faith of a transaction involves the motive with which it is entered into. Thus, if a purchaser knowing of a judgment, not itself a lien, has the view and purpose to defeat the creditor's execution, his purchase is iniquitous and fraudulent, and is void against the creditor, notwithstanding he may give a full price. But if his intention is pure, the sale is valid.—*Beals v. Guernsey*, 8 John. 448; 8 Taunt. 678; 1 Burr. 474. Mere knowledge of a lien is not incompatible with good faith, because the purchaser may buy subject to it.

The freedom of sale and purchase of property is as essential as the security of debts. The statute seems to have been intended to accomplish both of these ends. It prescribes the conditions of the lien, and protects the purchaser unless they are complied with. Without the required precautions, there is no lien; it is null and void.

The bill was filed to correct a mistake in a deed, and to obtain the protection of the statute above referred to against a threatened sale of the complainant's land under an execution against her vendor. The demurrer to the bill

Ex parte Locke.

on the ground of failure to allege want of notice, and payment of all the purchase-money, was erroneously sustained.

The decree is reversed, and the cause remanded.

EX PARTE LOCKE.

[APPLICATION FOR MANDAMUS.]

1. *Costs, security for, when sufficiently lodged in suit by corporation.*—In a suit by a corporation, security for costs under section 2804 of the Revised Code, is sufficiently lodged with the clerk by endorsing or entering it upon the summons or complaint before they are handed to the sheriff to be executed. The facts of this case show that section 2804 of Revised Code was substantially, if not literally, complied with.

THIS was an original application by petition, by W. M. Locke *et al.* to this court for a *mandamus*, or other appropriate process or writ, to compel the judge of the city court of Eufaula “to dismiss the action pending in said court in favor of the Importing and Exporting Company of Georgia, against petitioners, for the reason that security for costs was not lodged with the clerk before the commencement of the action,” &c., the said city court having overruled the motion made by petitioner to dismiss said suit, &c.

In support of the motion in the court below, petitioners proved that the complaint was written on one side of a sheet of “foolscap” paper; that it filled up one side of said leaf of paper, and about one half of the opposite and only other side; and that upon this last mentioned side of foolscap paper, and immediately following the close of the complaint, security for costs appeared, as follows:

“The plaintiff being a corporation, we hereby bind ourselves as security for costs in this case.

Eufaula, April 28, 1871.

SHORTER & MCKLEROY.”

Ex parte Locke.

The record does not show that there was any written approval of the security for costs.

In support of the motion, petitioners further proved that John Gill Shorter and John M. McKleroy, and either of them, were authorized by the clerk of the court in writing to sign his name officially as clerk, &c., to all writs, &c., and approve all bonds, &c., for costs, &c. This authority was dated July 5th, 1870. It was also proved that John M. McKleroy, on the 29th of April, 1871, after having written out the complaint and the security for costs above mentioned, dated the same, and signed the clerk's name to the summons, handed the same to the deputy clerk, who had been duly appointed, taken the oaths required by law, &c., and instructed said deputy clerk to deliver the same to the sheriff, which was done on the same day. This being all the evidence, the court overruled the motion.

F. M. Wood, and J. M. BUFORD, for the petitioners.—

1. Section 2804 of the Revised Code requires corporations, before commencing suit, to lodge with the clerk security for costs. Nothing short of a *lodgment* with the clerk will answer the requirements of this statute.

Section 2804 of the Revised Code, as it originally stood, applied to ordinary suits, and required a lodgment of security for costs with the clerk, or its endorsement upon the complaint. One of these things had to be done.—*Ex parte Robbins*, 29 Ala. 74. This case arose prior to the 20th of February, 1860, when said section 2802 was amended so as to allow security to be given to the officer issuing the writ of attachment, or endorsed upon the writ of attachment; but in construing that section of the Code before it was amended as above, the court held that in attachment cases, when the writ was issued by an officer other than the clerk of the court to which it was made returnable, the plaintiff could attach the complaint to the writ, and endorse the security upon such complaint. This would comply with the law. But either this or a lodgment with the clerk of the court had to be done. Under section 2804

of the Revised Code, as construed in *Ex parte Robbins, supra*, nothing short of a lodgment with the clerk, or endorsement upon the complaint, would answer the demands of the law; and the endorsement upon the complaint was good, because expressly allowed by that statute.

Section 2804, which applies alone to suits by corporations, is not in the alternate; only one way of giving security for costs is provided for—that is, by lodgment with the clerk—and this particular mode will admit of no substitute. The statute must receive a strict construction.—*Ala. & Tenn. Rivers Railroad v. Harris*, 25 Ala. 235.

2. The security in the case now before the court was endorsed upon the complaint, and accepted by John M. McKleroy, one of the attorneys for the plaintiff, at the time he issued the summons, in the name of the clerk, under written authority shown in the bill of exceptions. This was not a lodgment with the clerk within the meaning of section 2804 of the Revised Code. It can no more answer the demands of that section than the endorsement of the security upon the writ of attachment issued by an officer other than the clerk of the court to which it was returnable, would answer under section 2802 of the Revised Code before it was amended on the 20th day of February, 1860. And in *Ex parte Robbins, supra*, it is expressly decided that the endorsement of the security upon the writ of attachment was insufficient under section 2802 of the Revised Code.

3. Besides, the power to take and approve a bond for security for costs is an act judicial in its nature, and can not be delegated to an attorney either by a writing or verbally; and the taking and approving of the security for costs by said McKleroy amounts to nothing. It can have no more validity than the judicial act performed by a private person appointed by a judge of a court to decide a given case. For this reason, if for no other, the security for costs, given and accepted in the manner shown by the evidence, is equivalent to no security, and the suit should have been dismissed.

Davis et al. v. The State.

SHORTER & McKLEROY, *contra*.

PECK, C. J.—Section 2804 of the Revised Code, if not literally, was substantially complied with by the plaintiff in the action against the petitioners, in the city court of Eufaula, before the suit in that behalf was commenced.

Security for the costs was given and entered on the complaint, which was in the office of the clerk, and actually in the hands of the deputy clerk, before the summons and complaint were handed to the sheriff to be executed. This was sufficient.

A writ, so far as giving security for costs is concerned, is not considered as commenced until the summons and complaint are handed to the sheriff to be served.—*Ala. & Tenn. Rivers Railroad Co. v. Harris*, 25 Ala. 229. The suing out the writ is the commencement of the action. *Cox v. Cooper*, 3 Ala. 256. A writ can not be said to be sued out until it passes from the hands of the clerk to the sheriff to be executed; and security for the costs may be lodged with the clerk at any time before that is done.

Let the application for a *mandamus* be denied, at the costs of the petitioners.

DAVIS ET AL. *vs.* THE STATE.

[INDICTMENT FOR SELLING LIQUOR TO A MINOR.]

1. *Indictment and proceedings thereon; when void.*—An indictment found by a grand jury at a term of court held at a time unauthorized by law, is a nullity, and so are all the proceedings thereon. Such an indictment should be quashed, and after conviction thereon, judgment should be arrested on motion.

APPEAL from Circuit Court of Randolph.
Tried before Hon. L. R. SMITH.

The facts are sufficiently stated in the opinion.

C. D. HUDSON, for appellants.

ATTORNEY-GENERAL, *contra*.

PETERS, J.—This is an appeal from a conviction and judgment on an indictment for retailing, purporting to have been found at the spring term, in 1870, of the circuit court of Randolph county, in this State. The record shows that the said indictment was filed in said circuit court on the 12th day of March, 1870. There was a motion to quash said indictment, and also a motion in arrest of judgment, for the reason that said indictment was found at a term of said court not authorized by law.

It is known to this court that the law authorizing a term of said circuit court to be held on the first Monday in March, 1870, had been repealed on the 18th day of February, 1870, by an act of the general assembly of this State, entitled "an act to amend and repeal subdivision ten of section 750 of the Revised Code," approved February 18, 1870.—Pamph. Acts 1869–70, p. 166, No. 159. This act last said appointed the time of holding the spring term of said court on the third Monday in February, and permitted it to continue for two weeks. This could not bring the term of the court up to the 12th day of March in that year. So it was evident that the court was held at a time not appointed by law. When this is the case the proceedings of the court are void.—*Garlick v. Dunn*, 42 Ala. 404; *Wightman v. Karsner*, 20 Ala. 446; *Cullum v. Casey & Co.*, 1 Ala. 351. The indictment ought, therefore, to have been quashed, and the judgment ought to have been arrested. The learned judge in the court below erred in both these particulars.

The judgment of the court below is reversed, but the cause is not remanded, as the proceedings in the court below are void.

MERRILL ET AL. *vs.* THE STATE.

[SCIRE FACIAS ON FORFEITED BAIL BOND.]

1. *Undertaking of bail ; when not void.*—An undertaking of bail approved and taken by the sheriff under the order of a chancellor, is not void because the application for bail was not verified ; nor because proper notice was not given to the solicitor, and no writ of *habeas corpus*, or precept to the sheriff to produce the body of the prisoner, was issued. These requirements are directory, though they ought not to be omitted.
2. *Same ; plea, what subject to demurrer.*—A plea against the rendition of a judgment absolute on a forfeited undertaking of bail, that the accused appeared at the court, and was arrested on a *capias* issued by the clerk after indictment found, without more, is subject to demurrer.

APPEAL from Circuit Court of Randolph.

Tried before Hon. L. R. SMITH.

HUDSON, RICHARDS & HENDERSON, for appellants.

ATTORNEY-GENERAL, *contra*.

The facts appear in the opinion.

B. F. SAFFOLD, J.—The appeal is taken from a judgment absolute rendered against the appellants on an undertaking of bail. One error assigned is, that the order of the chancellor authorizing the sheriff to take and approve the undertaking was void.

James A. Merrill being in jail under a commitment by the probate judge as an examining magistrate, charged with murder, made written application to the chancellor for bail. This petition was signed with the name of Merrill, written by his attorneys at his instance, but it was not verified. The chancellor, on receiving it, with a copy of the evidence taken on the preliminary examination appended, made an order authorizing the sheriff to take the undertaking. He issued no writ of *habeas corpus*, or precept to the sheriff or other officer to bring the body of the

prisoner before him. Notice of the intended application was given to the solicitor, but the hearing was at another time and place than that designated.

Section 4261 of the Revised Code authorizes the application for a writ of *habeas corpus* to be made by any one in behalf of the prisoner. The verification is, that the statements are true to the best of the knowledge, information and belief of the petitioner. From the nature of the case, and the latitude allowed in the verification, the formalities required must be deemed directory merely. There might be no statement of the application which the petitioner could verify as a witness, not even the imprisonment. Nevertheless, the magistrate ought to require a verification to prevent imposition, and needless vexation of innocent persons. The chancellor obtained jurisdiction of the case.

In bailable cases, where the prisoner waives an examination into the facts, the judge may fix the amount of bail without notice to the solicitor or prosecutor; though in so doing he must act on the presumption that the offense is of the highest grade.—Rev. Code, § 4270. As this charge was of murder, and the highest grade is not bailable, the matter was conducted irregularly. But shall the prisoner and his bail be allowed to escape the liability they voluntarily assumed, on the ground that he was too guilty to go at large under any circumstances? All of the objections made by the appellants are to irregularities in their behalf. But the chancellor acquired cognizance of the case. He decided it to be bailable, and empowered the sheriff to take the bail, which was done. The undertaking is not void.

The plea of the defendants was, that the accused appeared at the next term of the court, and was arrested by the sheriff on a *capias* issued by the clerk upon an indictment found at that term. This was demurred to on the ground that it did not aver authority to the clerk to issue the *capias*, or that the bail had surrendered their principal. The demurrer was sustained. Section 4153 of the Revised Code, which requires the clerk to issue writs of arrest as

Harrison v. Holley.

soon as practicable after the filing of the indictment, excepts the cases where the defendant is in custody, or on bail. Section 4244 declares the undertaking of bail to bind the parties thereto, jointly and severally, for the appearance of the defendant on the first day of the court, from day to day of such term, and from day to day of each term thereafter, until he is discharged by law. These provisions, taken in connection with the privilege of the bail of surrendering the defendant whenever they desire to do so, compel the conclusion that the demurrer was properly sustained.

The judgment is affirmed.

HARRISON *vs.* HOLLEY.

[JUDGMENT BY DEFAULT—WITHDRAWAL OF APPEARANCE.]

1. *Appearance, withdrawal of; presumption in regard to, under facts of this case.*—Where the entry of a judgment by default recited that the plaintiff came by his attorney, “and the counsel of the defendant ask leave to withdraw their appearance, which is granted, and the defendant being called, came not, but made default,” &c., and this was the only evidence of any appearance by the defendant,—*Held*, on appeal, that it was not the defendant’s appearance that was withdrawn, but that of the counsel, as erroneously entered.

APPEAL from Circuit Court of Lowndes.

Tried before Hon. J. Q. SMITH.

The facts of the case appear in the opinion.

R. D. RUGELEY, for appellant.

CLEMENTS & GILCHRIST, *contra*.

B. F. SAFFOLD, J.—The summons was not signed by the clerk. The judgment entry recites that the plaintiff

came by his attorney, "and the counsel of the defendant ask leave to withdraw their appearance, which is granted, and the defendant being called, came not, but made default." The appeal is taken upon the record, and the above is all that is stated in reference to the appearance of the defendant. It was not the defendant's appearance that was withdrawn. This he might have done without leave. The counsel withdrew their appearance for him. The plaintiff was present and took his judgment by default without requiring any explanation of the condition in which his case was to be placed. The only conclusion to which we can come, is that the appearance of counsel for the defendant was improperly entered, and on that account was withdrawn. A summons not signed by the clerk, will not support a judgment by default.—*Winnemore v. Mathews*, January term, 1871.

The judgment is reversed, and the cause remanded.

MAYNARD vs. THE STATE.

[INDICTMENT FOR LARCENY OF HORSE.]

1. *Indictment; sufficiency of.*—An indictment for stealing "any horse, mare, gelding, colt, filly or mule," is sufficient, without alleging the value of the animal taken.—Revised Code, § 3706.
2. *Same.*—Such indictment is not bad, though it may consist of two counts, each of which charges a grand larceny, which is visited with the same punishment.
3. *Charge to jury; what not erroneous.*—A charge to the jury in a prosecution for horse stealing, that the *recent* possession by the accused of the property taken, unexplained, is evidence of guilt, is not erroneous, but is a proper exposition of the law.
4. *Stolen property, possession of; by whom can not be explained.*—Such possession by the accused can not be explained by proof introduced by the accused of the declarations made by him showing how he came in possession of the property stolen. This would make him a witness in his own favor, which is not permitted.—Rev. Code, § 2704.

Maynard v. The State.

APPEAL from Circuit Court of Wilcox.

Tried before Hon. P. O. HARPER.

The facts appear in the opinion.

JOHN McCASKILL, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

PETERS, J.—This is an indictment for stealing a horse. It contains two counts, which are in the following words :

“The grand jury of said county charge, that before the finding of this indictment, Gilbert Maynard feloniously took and carried away a horse, the personal property of Jordan Pickett, against the peace and dignity of the State of Alabama.”

“And the grand jury of said county further charge, that before the finding of this indictment, Gilbert Maynard feloniously took and carried away a horse, the personal property of L. W. Godbold, against the peace and dignity of the State of Alabama.”

This indictment was demurred to by the accused in the court below, upon the ground that the indictment charged two distinct offenses. This demurrer was overruled. The accused then pleaded not guilty, and went to trial on this plea, was found guilty, and sentenced to the penitentiary for three years. From this conviction the said accused appeals to this court.

On the trial below, a bill of exceptions was taken by the defendant, from which it appears that the horse named in the indictment was taken from the lot of said Jordan Pickett, and when found it was in the possession of the accused. And it was also shown that the horse was the property of said L. W. Godbold. It was not shown who took the horse from the lot. On this testimony, the accused moved the court to allow his explanation as to his possession of said horse to go to the jury. But the court refused, and the defendant excepted. The court then charged the jury, that “if the defendant had possession of the horse said to have been stolen, and did not explain said possession, it was *prima facie* evidence of his guilt, and the jury might con-

vict if they thought proper." This charge was excepted to by defendant.

The indictment is not obnoxious to the objection raised by the demurrer. Generally, an indictment for larceny should allege the value of the property taken ; but for the stealing of "any horse, mare, gelding, colt, filly or mule," this is not necessary, because the stealing of any of these animals is made grand larceny by the Code, irrespective of the value of the thing taken.—*Sheppard v. The State*, 42 Ala. 531 ; Revised Code, § 3706 ; Pamph. Acts 1866-67, p. 243 ; Act No. 240, § 1.

And the offenses here charged are each grand larcenies. They are visited with the same punishment. When this is the case, it is not error to join two such charges in the same indictment.—*Ward v. The State*, 21 Ala. 16, 18 ; Revised Code, § 4125. There was, then, no error in overruling the demurrer.

I have carefully examined the charge of the court, and I find it free from error. The rule on this subject, as stated by East, and approved by Roscoe, is this : "It may be laid down generally, that whenever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent on that other to prove how he came by it ; otherwise the presumption is, that he obtained it feloniously."—Roscoe's Cr. Ev. p. 18, marg. ; *Taylor v. The State*, 42 Ala. 529. And the accused can not prove how he came by the property by his own declarations, because this would make him a witness for himself in his own case. This is not permitted, by our law, in criminal cases.—Rev. Code, § 2704 ; *Spivey v. The State*, 26 Ala. 90. It is, however, required by this rule that the possession shall be recent ; but here the testimony shows that this was the case.—Roscoe's Crim. Ev. p. 19, marg.

The judgment of the court below is affirmed ; and its sentence will be carried into execution as required by law.

EVINS *vs.* THE STATE.

[CARRYING CONCEALED WEAPONS.]

1. *Pistol, what is not within the meaning of the statute prohibiting carrying of concealed weapons.*—A pistol that has no mainspring or other necessary parts of a lock, and can only be fired off by the use of a match, or in some other such way, is not a pistol, within the purview and meaning of the statute prohibiting the carrying of concealed weapons, and no person should be indicted and punished for carrying such a pistol.

APPEAL from the Circuit Court of Perry.
Tried before Hon. M. J. SAFFOLD.

The facts appear in the opinion.

MOORE & LOCKETT, for appellant.
JOHN W. A. SANFORD, Attorney-General, *contra*.

PECK, C. J.—The defendant below was indicted under section 3555 of the Revised Code, for carrying a pistol concealed about his person, against the peace and dignity of the State. All the evidence, and the charge of the court given to the jury, and the charges asked by the defendant and refused by the court, are set out in the bill of exceptions.

The evidence shows, that the pistol carried by the defendant as aforesaid was harmless as a weapon; that it could not be fired off, as a pistol is usually fired off; that it had no mainspring, or other necessary machinery of a lock; that the hammer or cock was disconnected and loose, and that the nipple or tube was so flattened as not to be touched by the hammer when down, and it was doubtful whether it could be fired off by a cap on the tube, &c.

The court, on the evidence, charged the jury in substance, that the said pistol was a pistol within the meaning of the statute prohibiting the carrying of concealed weapons.

In this we think the court erred. We hold, that a pistol,

to be within the purview and meaning of the statute and the mischief and evil intended to be prevented, must have such a degree of perfectness, as that it may reasonably be carried and used as a weapon. It is not enough that it has a stock, and a barrel that may be loaded and fired off by a match or in some other such way.

This was clearly not the character and condition of this pistol. It was certainly worthless as a weapon, and no sensible person would have relied upon it as a weapon to attack an adversary, or to defend himself.

As this disposes of the case, we do not think it necessary to consider whether the charges asked by the defendant should or should not have been given. Let the judgment be reversed, and the cause be remanded for another trial.

MURRELL *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Escape of accused during trial, when may be given in evidence.*—The escape of the accused from custody during a criminal trial is evidence of guilt, which may be given in evidence against him on a second trial upon the same indictment and for the same charge, when it appears that there was no other reason for the escape than a fear of conviction on the first trial. But such evidence is not conclusive.

APPEAL from Circuit Court of Madison.

Tried before Hon. W. J. HARALSON.

The facts appear in the opinion.

WALKER & BRICKELL, for appellant.—1. The evidence admitted was irrelevant and illegal. Its direct tendency, and the only object of its introduction, was to prejudice the mind of the jury against the appellant, because of his

Murrell v. The State.

commission of another offense than that with which he was charged. The offense with which he was charged was committed prior to the spring term, 1866, of the court, when the indictment was found. The evidence offered and admitted against his objection was, that at the spring term, 1870, four years afterwards, while on trial of this indictment, and while the jury were deliberating on a verdict, he escaped. Flight or escape, immediately on the discovery or accusation of crime, is evidence against the party accused or suspected, but in such case *there is in point of time* a connection between the flight or escape and the crime. Here there was no such connection. "Flight as a criminative circumstance, depends materially upon the *time* when it takes place."—Burr. on Cir. Ev. 474.

2. This evidence was not only irrelevant—not having any connection with, or tending to elucidate the main fact to be proved, the appellant's guilt of the killing of Arthur Brown—but its obvious tendency was to prejudice the jury, by placing the appellant in the odious attitude of a man who, charged with a capital offense, adds to that another criminal offense—an escape from the custody of the sheriff. The case of *Boles v. The State*, 24 Miss. 456, though not precisely in point, in principle covers this case.

ATTORNEY-GENERAL, *contra*.—I. The conduct of the accused before, at the time of, and after the perpetration of the crime, can always be regarded by the jury.—Burr. Cir. Ev. 280, 401.

II. The flight of the prisoner is a circumstance indicating a consciousness of guilt. The weight which the jury will give to the evidence of such a fact will depend somewhat upon the time of the flight and its concomitants. If it occurred before accusation, it would be almost a confession. "*Fatetur facinus qui judicium fugit.*" If it took place afterwards, the fact should be submitted to the jury. It is a part of the conduct of the accused after the commission of the crime, which it is always proper to prove. Roscoe Cr. Ev. 18; *Martin and Flynn v. The State*, 28 Ala.

71-81; *Johnson v. The State*, 17 Ala. 618-24; *The People v. Rathbun*, 21 Wend. 500-48; Burr. Cir. Ev. 469, *et seq.*

PETERS, J.—William Murrell, the appellant, was tried in the circuit court of Madison county upon a charge of murder, at the spring term of said court, in the year 1871. The trial terminated in a conviction for manslaughter in the first degree, and the accused was sentenced to confinement in the penitentiary for five years. From this sentence he appeals to this court, and here assigns the matters set forth in the bill of exceptions for error.

The bill of exceptions shows that there had been a former trial of the accused on the same indictment, in said circuit court, on the same charge, in the year 1870, when the jury failed to agree, and there was a mistrial. On the trial in this case in the court below, the learned judge presiding permitted the State to offer evidence that on the former trial, after the "evidence was heard, the cause argued, the jury charged and retired to consider of their verdict, and while the jury were deliberating, the defendant made his escape, and after the adjournment of the court he was again arrested." To this evidence the defendant objected, but his objection was overruled, and the evidence was permitted to go to the jury. It is now insisted that this was error.

The escape was an attempt to flee, and it had reference to the charge in this case. Flight, in a criminal prosecution, is one of the most common grounds for a presumption of guilt. And when the flight is connected with the offense charged and for which the accused is on trial, it is an act that indicates fear, and this fear points to guilt. Acts speak as well as words, and they are to be interpreted by the common experience of mankind. And a flight is universally admitted as evidence of the guilt of the accused, though it is not conclusive.—*Johnson v. The State*, 17 Ala. 618, 624; *Martin and Flinn v. The State*, 28 Ala. 71, 81; *Foxley's Case*, 5 Co. 109b; Burr. Cir. Ev. 472; Rose. Ev. 17, and notes; McNally Ev. 577. Here the attempt was to flee, and to flee from this charge. The above

Wright and Wife v. Snedecor.

authorities very clearly show that the action of the learned judge in the circuit court was free from error.

The judgment of the circuit court is therefore affirmed.

WRIGHT AND WIFE *vs.* SNEDECOR.

[ACTION COMMENCED BY ATTACHMENT TO ENFORCE LIABILITY OF SEPARATE ESTATE OF NON-RESIDENT MARRIED WOMAN FOR DEBTS CONTRACTED UNDER SECTION 2376 OF REVISED CODE.]

1. *Attachment; variance between cause of action stated in affidavit, &c., and that stated in complaint; how may be taken advantage of.*—In an action commenced by attachment, a variance between the cause of action stated in the affidavit and attachment, and the cause of action described in the complaint, may be pleaded in abatement.
2. *Attachment to enforce payment of debt against husband and wife, contracted under section 2376 of the Revised Code.*—Whether or not an attachment can be issued against husband and wife to enforce payment of a debt contracted under section 2376 of the Revised Code, is an open question, which the court will decide when a proper case arises.

APPEAL from Circuit Court of Greene.

Tried before Hon. LUTHER R. SMITH.

THE appellee and his partner, Hutton, now deceased, in their firm name of Snedecor & Hutton, sued out an attachment against appellants, as husband and wife, on an affidavit that said firm had a moneyed demand, the amount of which could be certainly ascertained, to-wit, two hundred and forty-one dollars and thirty cents, due the first day of February, 1868, against the appellants, John V. Wright and Georgia H., his wife; and that they were justly indebted to said Snedecor & Hutton, inclusive of interest, on said moneyed demand to date, (19th of April, 1869,) in the sum of two hundred and sixty-four dollars and forty-four cents; and that said John V. and Georgia H. Wright were non-residents, &c. The attachment, as to

the character and amount of the alleged debt, conforms to the affidavit, and commands the sheriff to attach so much of the estate of said John V. and Georgia H. Wright as would be of sufficient value to satisfy said debt and costs, &c. The sheriff's return states that he had executed the attachment by levying the same on certain lands, describing them as the separate property of the wife, Georgia H. Wright.

The plaintiffs, by their complaint, declared under section 2376 of the Revised Code, on an account for articles of comfort and support, &c., sold to the defendants, as husband and wife, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law. The defendants craved *oyer* of the affidavit and attachment, and pleaded the variance between the cause of action disclosed in the affidavit and attachment and the cause of action described in the complaint, in abatement. To this plea the plaintiffs demurred, and the court sustained the demurrer.

There were various other rulings and a charge of the court to which defendants excepted, which it is not necessary, in the view taken of this case by the court, to notice further. The defendants now appeal, and here assign among other errors, the sustaining of the demurrer to the plea in abatement.

WILEY COLEMAN, and JOHN G. PIERCE, for appellants.

1. There is no law in the State which authorizes an attachment to issue in a court of law against a married woman's separate estate in the first instance.—See *Talliaferro v. Lane*, 23 Ala. 369. Nor is there any law of this State which authorizes an attachment to issue against a married woman in a court of law. It was void.

This proceeding is attempted to be sustained under section 2376 of the Revised Code.

This section has been strictly construed by this court for the protection of the property of married women.

The action spoken of in this section is special and peculiar, and a *different cause of action* from that embraced in

the Code for which attachment may issue at law. If attachments are allowed under this section, it will lead in many instances to consequences fatal to the intention of the framers of the law.

As heretofore such estates have been guarded to the extent that before a sale of the property, there must have been a judgment of the court condemning it, after a trial showing its liability under said section.

If a sheriff can levy on it in the first instance under attachment, in many instances where the property is perishable he can and must sell before court, and before a trial, thereby destroying the separate estate, even if the plaintiff should fail in the action.

No demurrers will be considered except those assigned specially.—Rev. Code, § 2656 ; also, § 2638. And the court erred in sustaining the demurrer to the 1st, 2d and 3d pleas, as shown by the record and bill of exceptions. *Summerlin v. Dowdle*, 24 Ala. 428 ; *Chapman v. Spence*, 22 Ala. 588 ; 1 Chitt. Pl. 254 ; *Morrison v. Taylor*, 21 Ala. 779 ; 18 Ala. 395.

The complaint was a total departure from the cause of action disclosed in the affidavit, bond, and writ of attachment. The affidavit disclosed a simple contract debt, for which a married woman is not bound at common law, nor under the law of this State ; and it disclosed that Georgia H. Wright was a married woman. It disclosed a cause of action, then, for which she was not bound, although her husband might be, and for which she was not personally liable. In fact, the proceeding in any form of action at law is against her property, and not against her personally.

The question is new in this State ; no case in point can be found, where an attachment has been sued out under said section ; and if it can be done, it will in many cases put upon the sheriff the difficult task of determining before hand what properly constitutes the separate estate of a married woman. If it can be allowed, the property to be levied on ought to be specified in the writ of attachment.

Under section 2376 of the Revised Code, "the liability of the separate estate is not to be enforced as in cases of

judgments operating *personaliter* by an execution in the sheriff's hands, but by the action through the judgment of the court rendered in that action."—*Ravesies and Wife v. Stoddard*, 32 Ala. 603. This is conclusive to show, that in this peculiar action, the sheriff has no right to touch the property of a married woman's separate estate under execution, nor can the action spoken of in said section be enforced in any, until there is a judgment of the court condemning the property. If this action can not be enforced by *execution in the hands of a sheriff*, it can not be enforced by attachment in the first instance.

R. CRAWFORD, *contra*.—1. The action of the circuit clerk in granting the attachment on the affidavit alleged to be insufficient can not be reviewed in the appellate court.

When a statement is required in no prescribed form as a predicate for the action of a court or judge, and as a step in a remedial proceeding, conclusive upon no right of the party, whether that statement shall be more or less specific and definite, must be regarded as a matter of practice resting in the discretion of the court of original jurisdiction, and not a proper subject for a proceeding in error. *Harrison & Wiley v. King, Corey & Howe*, 9 Ohio St. R. 388, p. 393.

2. The ground for an attachment may be stated in the affidavit in the language of the statute, without specifying more particularly the facts intended to be alleged.—*Coston v. Paige*, 9 Ohio St. R. 397; *Rayburn v. Brockett & Brockett*, 2 Kansas, 227.

3. If the affidavit in the case show enough to call upon the officer to exercise his judgment upon the weight of the evidence in establishing the grounds of the application, the affidavit on a motion to set aside the attachment for irregularity will be held sufficient. The same applies to a plea in abatement by analogy.—*Furman et al. v. Walter, &c.*, 13 How. Pr. R. pp. 856, 349.

4. Other special facts and circumstances are only required in affidavits on application for attachments for damages.—Rev. Code, § 2932.

5. To embody in the affidavit the allegations of the complaint, so as to prevent the alleged variance, requires creditors to swear to conclusions of law; would, in effect, prevent subsequent amendments of complaint or the filing of additional counts, for fear of new variances.

6. The rule prescribes *in effect* the filing of declaration at commencement of attachment, whereas the Code allows it to be filed within the first three days of the return term.

7. Although no affidavit or bond be filed, unless there is a plea in abatement to the first term, the proceeding is not reversible.—Code, § 2989.

8. As to non-residents, the Code specifically requires certain additional allegations in affidavit.—Code, § 2933.

9. The use of the statutory word “demand,” in the affidavit, is generic, and more comprehensive than “debt,” or “joint liability,” and includes claims on persons or *in rem*.

10. The affidavit need not disclose the evidence of the debt, as a bond or note, or how it accrued.—*Starke v. Marshall*, 3 Ala. 44; *Fleming v. Burge*, 6 Ala. 373.

11. The writ of attachment is for the *estate* of the defendant or defendants, and so run the allegations of the complaint, and there is no material variance between them.

12. Appellee pleads for a liberal construction of this remedial statute, so as to advance its manifest intent. Code, § 2990.

13. It is submitted that there can be no abatement because of defective affidavit.—Code, § 2989.

14. The sheriff levied on said separate estate mentioned in the declaration, and the alleged variance did not mislead him.

15. The defense as to variance is *eminently technical*, and totally destroys the remedy of a creditor against the separate estate of a non-resident married woman.

PECK, C. J.—The court below erred in sustaining the demurrer to the plea in abatement. It is a general rule of pleading, that the declaration must correspond with the process. If the writ discloses one cause of action, and the plaintiff declares on substantially a different cause of ac-

tion, the defendant may plead the variance in abatement. *Summerlin v. Dowdle*, 24 Ala. 428; *Curry & Co. v. Payne, adm'r*, 3 Ala. 154; *Turner et al. v. Brown et al.*, 9 Ala. 866; *Palmer v. Lesne*, *ib.* 743.

Although I have not been able to find, in our Reports, a case in all respects like the present, sustaining a plea in abatement for a variance between the affidavit and attachment and the complaint, I find many cases in principle analogous to it. In the case of *Burt v. Parish*, (9 Ala. 21,) it is decided, that defects in the bond and affidavit made on suing out an attachment are not available on error, unless the exception has been taken by plea in abatement in the court below. So in *Jones v. Pope*, (6 Ala. 154,) it is held, that the want of a bond and affidavit, in a suit commenced by attachment, must be taken advantage of by plea in abatement. Again, in the case of *Cobb v. Force, Brothers & Co.*, (6 Ala. 460,) the court decides, that in an attachment by one non-resident against another, the affidavit should show that the defendant has not sufficient property within the State of his residence to satisfy the debt, within the knowledge or belief of the person making the affidavit, and if it fails to do this, the defect is sufficient to abate the attachment when pleaded. And in the case of *Roberts v. Burke*, (6 Ala. 348,) it is held, that where a suit is commenced by attachment, the attachment is the initiatory process in the cause, and a variance between it and the declaration can not be reached by a demurrer, thereby clearly intimating that it might be by a plea in abatement. Without citing other cases on this subject, we hold, that a material variance between the cause of action stated in an affidavit and attachment, and that described in the complaint, may be pleaded in abatement. If a variance between the writ and declaration is a good ground for a plea in abatement, there is no good reason why it should not be for a variance between the affidavit and attachment, and the complaint.

In this case, the variance between the cause of action described in the complaint, and that stated in the affidavit and attachment, is manifest and material. That stated in

the affidavit and attachment creates a joint common-law liability against the defendants, to which the coverture is a good defense as far as the wife is concerned; whereas, the cause of action described in the complaint is special and peculiar in its character, and has no existence independent of section 2376 of the Revised Code. By that section, a new action unknown to the common law is given to a creditor, against husband and wife, to enable him, without being compelled to resort to a court of equity, to subject the separate estate of the wife to the payment of his debt, provided it be a debt of the character described in said section of the Code.

The view which is here taken of this question disposes of the case, and renders it unnecessary to decide the others raised by the bill of exceptions. They will probably not arise on another trial. One of these questions is, can an attachment be issued against husband and wife, to enforce the payment of a debt contracted under said section 2376 of the Revised Code? So far as we know, this question has never, before this, been presented in this court for decision, and, as it is a new question, and can not be said to be free from difficulty, and not required to be now decided, we prefer to leave it an open question, to be disposed of when a case arises making its decision necessary. Let the judgment of the court below be reversed, and the cause remanded, &c.

OXFORD IRON CO. vs. SPRADLEY.

[ACTION ON PROMISSORY NOTE.]

1. *Section 2682 of Revised Code; to what applies.*—Section 2682 of the Revised Code applies to written instruments, the foundation of the suit, purporting to be made by a corporation defendant, its agent or attorney, in like manner as it applies to instruments purporting to be made

by natural persons, &c., and must be received in evidence without proof of the execution, unless the execution thereof is denied by plea verified by affidavit.

2. *Manufacturing and other corporations; what powers have.*—Manufacturing and other like corporations in this State, unless expressly prohibited by their charters, may borrow money, and make and receive promissory notes and bills of exchange, in carrying on their lawful business. The presumption is in favor of the validity of notes and bills of exchange made by and to such corporations, and that they are made in the lawful course of their business, until the contrary is shown.
3. *Promissory note; what void.*—A promissory note by an iron company for money or other thing loaned to it, to be used by the company in erecting iron works and making iron for the late Confederate government for military purposes in carrying on the late rebellion against the United States, if known to the lender at the time of the loan, is illegal, against public policy, and no action can be maintained on it.
4. *Corporation aggregate; what, admits corporate character of.*—Where the defendant is sued as a corporation aggregate, the appointment of an attorney, and an appearance entered by him, is an admission of record of the corporate character of the defendant.

APPEAL from Circuit Court of Calhoun.

Tried before Hon. WM. L. WHITLOCK.

THIS was an action commenced by appellee against the appellant on promissory note, a copy of which is as follows:

“\$1540.00.

OXFORD IRON WORKS,

April 7th, 1863.

“On demand we promise to pay to M. D. C. Spradley, or order, one thousand five hundred and forty dollars, for value received, with interest at the rate of eight per cent. per annum.

“OXFORD IRON COMPANY,

“Per RICHARD L. CAMPBELL, President.”

The complaint is in the form given in the Revised Code for “action on promissory note by payee against maker,” and states that the note was made by the defendant. Service having been duly executed, the defendant appeared by attorney, and pleaded in short by consent—

“1st. *Nul tiel* corporation.

“2d. The note sued on was given for an illegal consideration.

"3d. The note sued on was given in consideration of one thousand five hundred and forty dollars of Confederate treasury-notes loaned by plaintiff to defendant, and without any other consideration, and said treasury-notes were not of any value when loaned by plaintiff to defendant, and were not of any value when plaintiff's supposed cause of action accrued on said note.

"4th. Failure of consideration.

"5th. *Non assumpsit*."

No replication was filed by the plaintiff, so far as the record shows, and no further notice seems to have been taken of the pleas, although the judgment entry states that the parties came by their attorneys, and issue being joined, thereupon came a jury," &c.

The plaintiff offered in evidence the note, and the defendant objected to its admission—1st. Because the note on its face is the individual note of R. L. Campbell, and not the note of defendant. 2d. Because the execution of the note is not proved. 3d. Because the agency or official relation of Campbell to defendant was not proved. 4th. Because it is not shown that defendant had the capacity to contract, or Campbell the power to bind it.

The court overruled these objections, and defendant excepted. The plaintiff then read the note in evidence to the jury, and there rested his case.

It appears from the bill of exceptions that the plaintiff desired one Knox to get employment for him with the Oxford Iron Company, as he would thus be exempt from service in the Confederate army; that he went into the employment of the company in November, 1862, before the works had been so far completed as to make iron, and remained until the close of the war in 1865; that the company commenced turning out iron in June, 1863; that at the time he went into the service of the company, plaintiff had been informed that defendant was erecting its works to make iron for the Confederate government, to aid in carrying on the war then being waged against the United States; that it was generally known among the employees and persons in the county and neighborhood, that the

company was building its works to furnish iron to the Confederate government for use in its military operations. It further appeared that plaintiff held a note on one Harralson, which the president of the company told plaintiff the company would take, collect, and use the money so collected in defraying the expenses of the company, and give the company's note therefor. The plaintiff assented to this, sent Harralson's note to Selma for collection, and shortly afterwards received therefor the note sued on, which was executed by Campbell in plaintiff's presence. The company used the money so collected in paying its liabilities and defraying its expenses. The proof was conflicting as to whether the note sued on was given for the note on Harralson, or for the Confederate money collected on it.

The court, against the objection of the defendant, permitted the clerk to the judge of probate of the county of Calhoun to testify that he was clerk in 1862 and 1863, and as such recorded the articles of association between Woodson, Knox and others to form a corporation called the Oxford Iron Company, for the manufacture of iron. The articles, when recorded, were taken from the office by a person who was not remembered. The record was destroyed 15th July, 1864, by fire, and witness remembers nothing of their contents. The books of the company were all destroyed by the United States forces, who burnt the works in 1865, except one book produced in court. The defendant waived notice to produce the articles of association, but objected to and excepted to the admission of the evidence in relation to them.

Among other charges asked, the defendant asked the following:

"If the jury believe from the evidence that Woodson, Knox and others executed and acknowledged, and caused to be recorded in the probate court of Calhoun county, articles of association or agreement for the promotion of a corporation by the name of the Oxford Iron Company, for the manufacture of iron, which was done in the last of the year 1862, or early in 1863, that this did not create a corporation."

This charge the court gave with the qualification—"But if the jury believe that said corporation went into operation and manufactured iron, it would be a corporation."

To the refusal to charge as requested, and to the giving of the charge as qualified, the defendant excepted.

"5. That if the jury believe that the plaintiff loaned money or a note on Harralson to the defendant, with the knowledge that the proceeds of the note or money was desired by the defendant to enable it to erect iron works to manufacture iron for the Confederate government, to be used for military purposes by the Confederate government in the late war between the United States and the Confederate States, and the note sued on is given in consideration of the money or note so loaned by the plaintiff to the defendant, then the plaintiff can not recover in this action."

"6. That if the jury believe that the plaintiff let the defendant have money, or a note on a third person, with a knowledge that such money or note, or the proceeds of the note, was obtained by the defendant to enable the defendant to make iron for the Confederate government to be used for military purposes in the late war between the United States and the Confederate States, and the said money or note was so used in making iron, and the consideration of the note sued on is money or a note on a third person so obtained by the defendant of the plaintiff, then the plaintiff can not recover in this action."

The court refused to give either of these charges, and the defendant excepted.

The jury found a verdict in favor of the plaintiff for \$1,788.71, and defendant appeals, and here assigns among other errors—

1st. The admission of the evidence in relation to the articles of association or agreement for the formation of the corporation.

2d. The refusal to give the 5th and 6th charges asked by the defendant.

JOHN T. HEFLIN, for appellant.

(Appellant's brief did not come into Reporter's hands.)

FOSTER & FORNEY, for appellee.—1. There was no plea verified by affidavit denying the execution of the note sued on. It purported to be made by the defendant, per Campbell, president of the company, and must therefore be received as evidence of the debt sued upon, and that it was made on sufficient consideration.—*Ala. & Flor. Railroad v. Watson*, 42 Ala. 74; *Ala. & Miss. Railroad Co. v. Sanford & Rice*, 36 Ala. 704; *Ala. Coal Mining Co. v. Brainard*, 35 Ala. 476; *Talladega Ins. Co. v. Landers*, 43 Ala.

2. A corporation is liable for contracts made by its agents, and also upon a promissory note. If a note has been given in a manner not authorized by law, or for an illegal purpose, that must be shown by the defense. The presumption of law is that the note is legal, and the corporation was authorized to make it.—3 Wend. 94; 7 Cowan, 540; 1 *ib.* 513; 2 *ib.* 664.

3. If a person assuming to act as agent of a corporation, but without legal authority, make a contract, and the corporation receives the benefit of it and use the property acquired under it, such acts will ratify the contract and render the corporation liable. The defendants must show that they had no power to borrow money under their charter.—1 Pick. 372; 19 Johns. 64.

4. A corporation is bound by the same implications and inferences as a natural person; it may appoint, and such appointment will be inferred by such acts as create a presumption of agency, or by a ratification of his acts. The declarations of the agent in making a contract are evidence, not because he may be a member or an officer of the corporation, but because he is agent.—*Bates & Hines v. Bank of Alabama*, 2 Ala. 451.

5. They are liable upon an implied *assumpsit*, as well as an expressed one.—16 Vermont, 86.

6. If authorized by their charter to contract in a particular mode, they may by practice render themselves liable on instruments executed in a different mode.—*Walter v. Derby, Friley & Co.*, 2 Cowan, 260.

7. This defense of illegal consideration as between plaintiff and defendant, in the language of Lord Mansfield,

"sounds at all times very ill in the mouth of the defendant."—Chitt. on Con. 658. The presumption of law is in favor of the legality of the contract. If it is susceptible of two meanings, one legal and the other invalid, that interpretation shall be put on it which will support and give operation to the contract. It is for the party who takes the objective to prove it, although the burden is thrown on him to establish a negative. And the proof should be positive and clear.—Chitt. on Con. 659.

If, then, the consideration of this contract was not illegal—as the jury under the ruling of the court says it was not; if the promise to pay the amount was not illegal—and it is not pretended that it was; if it was no part of the contract, and the defendant had no intention or purpose to aid the rebellion, a bare knowledge of the illegal purpose to which the money was to be applied by the defendant can not vitiate the contract. The consideration, promise and purpose of the contract being valid, that interpretation shall be put upon the contract that will give it operation. If the contract, as in this case, is free from vice, it can not be avoided on the ground that it may probably facilitate an illegal transaction. If no part of the consideration or promise was illegal, the contract is not invalid, although the plaintiff knew the defendant was engaged in an illegal pursuit, and although the agreement might tend in some degree to facilitate the illegal operation and business of the company.—*De Groot vs. Van Dusen*, 17 Wend. 170.

PECK, C. J.—1. Under the pleadings in this case, the note, or copy of which is given in the bill of exceptions, was properly admitted in evidence, without proof of its execution. The suit is against the defendant as a corporation, and the complaint states that the note was made by the defendant. It is signed thus:

"OXFORD IRON COMPANY,
Per Richard L. Campell, Pres't."

It purports to be the note of the corporation defendant, made by its agent, the president of the company, and is

the foundation of the suit. There was, therefore, no error in permitting it to be read to the jury without proof of its execution, as its execution was not denied by a plea verified by affidavit.—Rev. Code, § 2682; *Ala. Coal Mining Co. v. Brainard*, 35 Ala. 476; *Ala. & Miss. Rivers Railroad Co. v. Sanford*, 36 Ala. 703. In the first named of these cases, it is held, that said section 2682 applies not only to cases where the instrument purports, on its face, to be executed by the defendant, his partner, agent, or attorney, but also where the complaint states it to have been so made. This disposes of the three first objections of the defendant to the reading of the note to the jury.

The fourth objection is, that it was not shown that the corporation defendant had the capacity to contract, or that Campbell, the president, had the power to bind it. The latter part of this objection is substantially like the third, and is therefore already disposed of. The other part of the objection, as to the capacity of the defendant to contract, is not well taken.

There are certain powers and capacities incident to every private corporation; among these is the capacity to sue and be sued, to take and grant property, to contract obligations, and do all other acts, not inconsistent with its charter, *as natural persons may*.—Angell & Ames on Corp., 2d ed., pp. 65–6. These powers may be freely exercised, whenever their exercise is essential to the accomplishment of the objects and purposes for which a corporation is created. An express authority is not required to confer on a corporation the right to draw, indorse, or to accept bills of exchange, or to make or receive promissory notes, provided the exercise of such a power is not obviously foreign to the purposes of its creation.—Angell & Ames, 192–3. And it will be implied, if not expressed, whenever it is directly or indirectly necessary to accomplish the purposes of its charter.

Under our general credit system, and the manner and modes of doing business, the success and prosperity of manufacturing corporations, and other enterprises of like

character, would be greatly impeded and embarrassed, if not utterly destroyed, without the capacity and powers to contract debts, borrow money, and make and receive bills of exchange and promissory notes. Therefore, these powers will be inferred, where there are no prohibitions to the contrary in their charters. The presumption is in favor of the validity of notes made by or to such corporations, and that they are made in the lawful course of their business, until the contrary is proved.—Angell & Ames, 198; *The New York Firem. Ins. Co. v. Sturges*, 2 Cowan, 664.

2. In the case of the *Oxford Iron Company v. Quinchett*, 44 Ala. 481, we held that “a contract made during the late rebellion, to loan or hire mules to a party known, at the time, to be engaged in the manufacture of iron for the late Confederate government, with a knowledge on the part of the bailor that said mules are wanted by said party, and are borrowed or hired by him to be employed in the manufacture of iron for said Confederate government, to be used by said government for military purposes, in carrying on said rebellion against the United States, is in violation of public policy, and void; and no action can be maintained on the same.”

We can see no substantial difference, in principle, between that case and the present. The evidence in this case tends to show that the note sued on was given for money loaned, or for a note that the plaintiff held on one Haralson, which he left the company to collect, and when collected the money was to be used by the company in erecting its iron works, and in making iron for the Confederate government, for military purposes, and to aid it in carrying on the rebellion against the United States, and that this was known to the plaintiff.

The plaintiff was examined as a witness in his own behalf, and among other things, stated that when he went into the employment of the defendant in 1862, he had been informed that the Oxford Iron Company was erecting its own works to make iron for the Confederate government, to be used for military purposes against the United States. He also stated that the note on Haralson was the consid-

eration of the note sued on ; that R. L. Campbell told him that the company would take the note on Haralson and collect it, and give the plaintiff the company's note for the amount of said note, and use the money collected on Haralson's note in defraying the expenses of erecting the iron works. This, with the other evidence in the case, we think, tends to show that the note sued on was made upon an illegal consideration, and formed a part of a transaction in violation of public policy. Therefore, the fifth and sixth charges asked by the defendant were proper charges, and should have been given, that the jury might have determined the true character of the entire transaction between the parties.

This defense on the part of the defendant and the persons composing the corporate body, we readily admit, is dishonest, unconscientious and immoral, and is not allowed for its or their sake, but is permitted solely on principles of public policy. If the plaintiff has made an illegal contract with the defendant, the courts can not, without a violation of judicial propriety, help him to enforce it.

3. The question as to the corporate character of the defendant is not properly raised on this record. The plea of *nul tiel* corporation, where a defendant is sued as a corporation aggregate, is an inappropriate plea, and an inconsistency in itself. We find no precedent for such a plea in such a case, nor any case in which it has been pleaded. The appointment of an attorney, and an appearance by him for the defendant, is an admission on the record that the defendant is a corporation ; therefore, if the court has been mistaken in any of its charges on this subject, it is an error that does not prejudice the defendant.

For the errors above noticed, let the judgment of the court below be reversed, and the cause remanded at appellee's costs.

SHROPSHIRE vs. BURNS, ADM'R.

[ACTION ON PROMISSORY NOTE GIVEN BY MINOR FOR PURCHASE OF HORSE,
AND SOLD BY ADMINISTRATOR AFTER HIS DEATH.]

1. *Infant, contract of; generally voidable, not void.*—Generally in this State, the contracts of an infant are voidable, but not void. And such contracts may be affirmed or avoided by such infant after he becomes of age.
2. *Infancy, defense of; by whom only can be pleaded.*—Infancy is a personal privilege, and it can only be taken advantage of by the infant himself, or by his personal representative.
3. *Infant, ratification of contract of; what will amount to.*—In like manner, the infant or his personal representative may affirm and ratify his contracts after he becomes of age; and the acts which will amount to ratification by an infant himself, will amount to a ratification after his death by his administrator or executor.
4. *Same.*—If a minor above the age of twenty, but under the age of twenty-one years, purchase a horse and give his promissory note for the purchase-money, and the horse is delivered to him, and the minor then dies before he attains his majority, and the horse comes into the possession of the administrator of the infant's estate, who sells the horse as the decedent's property, with a full knowledge that it had been so purchased by the infant, and had not been paid for, this is a ratification of the sale.

APPEAL from Circuit Court of Dallas.

Tried before Hon. B. L. WHEELAN.

The facts are sufficiently stated in the opinion.

PETTUS & DAWSON, for appellant.—The contracts of infants, not made for necessities, are generally *voidable*, not *void*, and may be ratified by the infant after he is of age. 1 Pars. on Cont. 243; Chitt. on Cont. 145-6, and notes. A promise to pay the debt, made to the creditor, is generally a ratification; and there are acts from which such promise will be inferred. If an infant have the property purchased, after attaining his majority, and sell it, he thereby ratifies the contract of purchase, and the law in-

fers a promise to pay.—Chitt. on Cont. 145-6; 1 Pars. on Cont. 268, 271, 272.

The contract of an infant may be ratified by his administrator. The case of *Jeffords, Adm'r, v. Ringgold & Co.*, 6 Ala. 544, is directly in point. There, as here, the infant died under age, and his administrator ratified the contract.

It being, then, settled that an administrator of an infant may ratify the contracts of his intestate, without any new consideration, it is a necessary inference that any act which, if done by the infant, would be a ratification, will, when done by the administrator, be also considered a ratification of the contract. In fact, this necessarily follows from permitting the administrator of an infant to plead his infancy.

In this case, the infant died in possession of the horse purchased by him; and the defendant, as the administrator of the infant, took the horse and sold him, knowing at the time all the facts of the case. This sale alone was a ratification. The court, in the first charge given, says in substance, that no act will amount to a ratification, unless the defendant intended to ratify the contract. This rule applies only to *mere promises*; but there are many *acts* from which a ratification will be absolutely deduced, without any regard to the intent. If an infant buy a horse and retain him after age, and payment should be demanded and refused, and then the plaintiff demand the horse and a rescission of the contract, and this also be refused, no intention to ratify could be inferred; yet this would be in law a complete ratification.—1 Pars. on Cont. 270-1. But the court not only charged that the *intention* to ratify must be proved, but the charges deny to the jury the right to infer that intention from the sale of the horse.

ALEXANDER WHITE, *contra*.—Under the law, the administrator was bound to take into possession a horse left by his intestate, and claimed by him as his property; and as whatever is done by an administrator, unless shown to the contrary, must be presumed to be lawfully done, the court

must assume that he sold him under an order of court and in conformity and obedience to law.

These acts had no reference, as a matter of fact, to the contract between appellant and the intestate of appellee ; it does not appear that defendant knew of the existence of the note, or that the plaintiff looked to him for payment of the note. It is not shown that defendant gave any assent of the mind to the act done by the infant in giving the note, nor that he ever thought of it.

Ratify, signifies "to approve, to sanction." Ratification is the act of ratifying *something done by another*.—Webster's Dict., *Ratification*, and *Ratify*. In sanctioning or approving an act done by another, there must be recognition in the mind of the act done, or else a man can approve something he knows nothing of, or does not think of. That is, that he can give the assent of his mind to a thing without knowing what it is that he assents to. This is an impossibility and absurdity.

The law requires the assent of the infant himself, when made after he comes of age, to be precise and explicit.

There must be such a promise to pay, or such express acts, as would be equivalent to a *new contract*.—Bingham on Infancy, 67 ; Chitt. on Cont. 146.

The promise must be to the party in interest, or to his agent.

It must be voluntary, free, and with a full knowledge that he would not be liable.—Bingham on Infancy, 68, note 6 ; Story on Cont. § 70.

It can not reasonably be assumed that an administrator of an infant would be held to have ratified an act of the infant, when the same act would not have been a ratification by the infant, had he lived.

The act by which the administrator is sought to be charged, is the *sale* of the horse.

This alone would not have bound the infant ; certainly not, unless he had sold him after he came of age.

No binding ratification of a contract can be made by an infant until he comes of age.—Story on Cont. § 68 ; Annual Dig. 24, 339, § 10 ; 16 N. H. 385.

This is an executory contract; and as to such there must be not only an *acknowledgment* of liability, but an express promise, voluntarily and deliberately made by the infant, *upon his arriving at the age of maturity*, and with the knowledge that he is not legally liable.—Story on Cont. § 69; *Curtin v. Patton*, 11 S. & R. 305; *Obin v. Hondlett*, 13 Mass. 237; *Boston Bank v. Chamberlain*, 15 Mass.; *Robbins v. Eaton*, 10 N. H. 561; *Rainsford v. Rainsford*, 1 Spears Eq. 385; *Tucker v. Montain*, 10 Peters 73; *Jackson v. Carpenter*, 11 John. 537; 2 Kent Com., top page 264, mar. 238, note (a).

The same evidence ought to be required of the ratification of a voidable contract after full age, as of the execution of a void one.—*Rogers v. Hund*, 4 Day, 57.

There must be some act of the infant after he reaches maturity, showing an *intention* to ratify; mere omission to ratify is not sufficient.—2 Kent Com., top page 264, note 3; *Wallace v. Lewis*, 4 Harring. R. 75; *Harris v. Cannon*, 6 Geo. 382; *Scott v. Buchanan*, 11 Humph. 468; *Tibbitts v. Gerrish*, 5 Fort. (N. H.) 41; *Taft v. Sergeant*, 18 Barb. 320; *ThurLOW v. Gilmon*, 40 Maine.

Declaration must be very clear, and with a *view to ratification*, to be sufficient.—*Hoyle v. Stow*, 2 Dor. & Battle, 320.

An infant can not bind himself for necessities, when he has a parent or guardian to supply his wants.—*Hull v. Connoley*, 3 McCord L. R. 6; *Guthrie v. Murphey*, 4 Watts, 80; *Edwards v. Higgins*, 2 McCord Ch. 16; *Khin v. Laramore*, 2 Paige, 415; *Warling v. Toll*, 9 John. 141; *Mortara v. Hall*, 6 Sim. 465; *Bainbridge v. Pickering*, 2 Bl. Rep. 1325.

Here it is shown that he had a guardian who supplied him in the very particular, (a horse,) and who objected to this purchase because he had supplied him.—*Cooke v. Deaton*, 3 C. & P. 114.

It is not necessary in this case to decide whether an administrator can in any case affirm the act of an infant intestate who died without attaining his majority, but only whether the facts in this case constitute a ratification.

The following is, however, respectfully submitted in ref-

erence to the case of *Jefford, adm'r, v. Ringgold & Co.*, 6 A. R. 544:

In the head-note it is said that the administrator of an infant may *verbally* ratify the act of the infant, when the proof showed that the note was given for a house and lot in Lowndesborough, and that the *defendant* had received a deed for the house and lot. This deed could not have been made to a dead man, and must have been made to the defendant. Here was a distinct and direct act of recognition of and taking a benefit to himself personally under the contract; after this, *he* may have been estopped from saying that the contract was not valid, but would this have been binding upon a subsequent administrator? The deed to the defendant as administrator would vest no title in the estate. An administrator is not authorized to receive a deed for the estate he represents. The deed should be made to the heirs; and it is only in certain statutory contingencies that an administrator has anything to do with the lands, and never has anything to do with *taking title* to them. In that case, then, he was not only doing a thing in taking the deed not *required* by law, but a thing not authorized by law, and put himself in a position in which he could be estopped from denying the validity of the contract, because he went beyond the line of his duty as administrator *expressly* to affirm the contract. The question occurs, could he bind the estate by taking, under a contract of his intestate, *property* to himself *individually*? In taking the deed he was necessarily informed of the contract, for it had direct and special reference to the contract and the parties to the contract.

An administrator succeeds to the rights and liabilities of his intestate, but this does not give to him the right to enlarge the liabilities of his intestate, nor to make valid that which is voidable.

Ratification must be of an act *done in infancy, after arriving at adult age*. I mean ratification by the party himself.

The first thing is, an act done by the party while under the age of twenty-one years of age. The next is, a ratifi-

cation of that act *after* he is twenty-one years of age. The party dies before he arrives at twenty-one years of age; he therefore *never* becomes of age; he is, and always must be, an infant.

Now, he could not ratify himself, if living. Can his administrator, as his representative, do that which he himself could not do?

The administrator is his representative, as *he was* when *he died*, not as he would have been had he lived longer. The administrator of an infant can not, by lapse of time, become the administrator of an adult; nor can he, in his representative capacity, attain or impute to one who died an infant, the majority which he would have attained had he lived.

In this case, there was a full knowledge that the guardian of the infant disapproved of the purchase; and appellant took the infant's note, with security, which was perfectly good, lies by and allows the administrator to sell the horse as belonging to his intestate, without a notice of any claim for the horse, or upon the administrator, and attempts to fix upon him a ratification of the note of the infant by an act in the doing of which he never thought of the note, and it is not shown that he knew there was such a note, and which act was in the direct line of his duty as administrator.

If this be the law, that a mere sale by an administrator of property of his infant intestate, is to be regarded, "*proprio vigore*," as a ratification of the voidable purchase of the infant, then the administrator is in effect deprived of the right to disaffirm, and compelled to affirm, at least as to all contracts of which he was not advised as to the perishable property of the infant. He is required by law to sell it, or to distribute, (and distribution would have the same effect as an act of ratification as a sale,) and in either event, according to the rule laid down by the appellant's counsel, he would be liable.

In such case, all that a creditor on such a contract as this would have to do, would be to lie by until the administrator had sold or distributed the property, and then sue

the administrator, and prove that he had sold or distributed the property.

PETERS, J.—This is an action at law founded on a promissory note, with security, made by an infant for the purchase-money of a horse. The infant died in possession of the horse before attaining his majority, and the administrator of his estate, who is the appellee in this court, took possession of the horse after his intestate's death, as a part of his estate, and sold him as such, and converted the proceeds of the sale to the use of the estate which he represented. The proof also shows that the infant and the vendor of the horse were both warned by the infant's guardian, who is another person than the administrator, that the horse would not be paid for by the guardian if sold to his ward. It also appeared that the infant owned a pony horse before the purchase of the horse in controversy in this case, and that his estate consisted in one-fourth interest in twenty negro slaves, and four thousand dollars in cash in his guardian's hands. And when the purchase was made he was above twenty years of age.

Upon these facts the court was asked by the plaintiff to charge the jury on the trial below, that if they "find from the evidence, that on the 12th day of September, 1860, the plaintiff sold and delivered a bay horse to R. F. Burns, the defendant's intestate, and that the note read in evidence was then and there executed by said R. F. Burns and R. E. Perry for the price of said horse; and that at the time of said sale of said horse, said R. F. Burns was under twenty-one years of age and over twenty years of age; and that said R. F. Burns took said horse at the time of the sale, and kept and used said horse until the said R. F. Burns died; and that said R. F. Burns died in the fall of 1860, and under twenty-one years of age; and that after the death of R. F. Burns, this defendant, as the administrator of said R. F. Burns, knowing all the facts in reference to the giving of said note and the purchase of said horse, and that said note had not been paid, took possession of said horse as such administrator, and sold

said horse as such administrator; then the plaintiff is entitled to recover the value of said horse and interest thereon, not exceeding the amount of the note and interest thereon." This charge was refused, and the plaintiff excepted. In this the learned judge of the court below erred.

For a long series of years our distinguished predecessors in this tribunal have treated the contracts of infants, in this State, as voidable, and not as void.—*Freeman v. Bradford*, 5 Port. 270; *Slaughter v. Cunningham*, 24 Ala. 260; *Manning v. Johnson*, 26 Ala. 446; *Clark & Co. v. Goddard*, 39 Ala. 164. But the contract of a minor can be avoided only by himself or his personal representative. It is a personal privilege, and only the person to be protected by it, or his administrator or executor, in such case as he can make a will, can avoid or affirm it.—*Jefford v. Ringgold*, 6 Ala. 544; Rev. Code, §§ 1910, 1916. And if the administrator or executor of the infant means to avoid or repudiate the contract made by the minor, he must do so in like manner as the minor would be required to do. If he fails to do this, the same rule which applies to a ratification or affirmation by the infant applies to him. 6 Ala. 544, *supra*. Here the administrator retained possession of the horse after the death of the infant, and sold it as a part of his estate in his hands to be administered. Such acts would have bound the minor himself as an affirmation or ratification of the contract of sale. And I see no sufficient objection why they should not also bind his representative for like reason as they would bind the minor himself. Such, it seems to me, is the current of our decisions and the dictates of justice. These decisions necessarily become rules of property in this State, and for this reason they should not be departed from.—*Manning v. Johnson*, 26 Ala. 446; *Weaver v. Jones*, 24 Ala. 420; *Baker v. Gregory and Wife*, 28 Ala. 546.

The judgment of the court below is reversed, and the cause remanded for a new trial.

CAMPBELL vs. THE STATE.

[INDICTMENT FOR SELLING VINOUS OR SPIRITUOUS LIQUORS WITHOUT LICENSE.]

1. *Section 3618 of the Code not repealed by revenue law of 1868.*—Section 3618 of the Revised Code, which forbids the sale of spirituous liquors without a license, is a criminal and not a revenue law, and is not repealed by the revenue law of 1868.

APPEAL from Circuit Court of Barbour.

Tried before Hon. J. McCALEB WILEY.

THIS is an indictment for selling liquor to a minor. The only evidence was, that the appellant sold one pint of whiskey to a minor, at the house of Atkinson Head in the county of Barbour. The court refused, at the instance of the defendant, to charge the jury, that if they believed the evidence they must acquit the defendant. The defendant excepted, and now assigns the refusal to give this charge as error.

JOHN A. FOSTER, for appellant.—1. Under this indictment, a conviction can not be sustained for an offense under the revenue law of 1868. Under section 3618 a party could be convicted, if a single act of selling without license was proved. Under the revenue laws of 1868, a conviction can only be sustained when it is proved that the defendant engaged in the business of retailing, or is by occupation a retailer, and failed or neglected to procure license. One act of selling does not necessarily constitute the seller a retailer. And therefore the indictment fails to charge any offense against the revenue laws of 1868.—*Carter v. The State*, 44 Ala.

2. The question, then, is, whether a conviction under an indictment made under section 3618 can be sustained? In *Mulvey v. The State*, (43 Ala.) the court held, that the revenue laws of 1868 do not expressly repeal section 3618. But it is apparent that they are repugnant thereto, and

thus by implication repeal said section and render it of no effect; otherwise, a party might be convicted under an indictment under the revenue law of 1868, and another under the section 3618 for one and the same act. It is evident that the revenue law of 1868 repeals section 437 of the Code, and no license can now issue in this State except in the manner prescribed in said revenue laws of 1868. And certainly a conviction can not be had under section 3618 for a single act of selling without procuring license under the revenue laws of Alabama of 1868. There is no provision now in existence by which a party may procure a license to sell liquor, but only a license to engage in the business of a retailer. In *Ex parte Burnett*, (30 Ala.) it is held, in effect, that before a conviction can be sustained for doing an act without license, some mode must be provided by which a license could have been procured. Such is this case. No law provides for issuing a license to a party to sell liquors, one time; and it can not be held that before a citizen can sell a single pint of whiskey, he must constitute himself a retailer by occupation, and procure a license as such. As well might it be said that, before he can sell a single pint of liquor, he must procure a license to keep a livery stable.

JOHN W. A. SANFORD, Attorney-General, *contra*.

B. F. SAFFOLD, J.—The appellant was convicted under an indictment for selling vinous or spirituous liquors without license. The prosecution was for a violation of section 3618 of the Revised Code, which is not a revenue law, but one for the prevention of offenses against public morality and decency. It is not repealed by the revenue law of 1868.—*Mulvey v. The State*, 43 Ala. 316.

The judgment is affirmed.

DALE COUNTY *vs.* GUNTER.

[ACTION BY WIDOW TO RECOVER DAMAGES FOR THE KILLING OF HER HUSBAND BY A PERSON IN AMBUSH, &c., UNDER ACT OF 28TH DECEMBER, 1868, "TO SUPPRESS MURDER, LYNCHING, ASSAULTS, AND ASSAULTS AND BATTERIES."]

1. *County, claim against; what, not required to be presented to commissioners court before suit*—The penalty given against a county by the act entitled "an act to suppress murder, lynching, assaults, and assaults and batteries," approved December 28, 1868, is not a claim required to be presented to the court of county commissioners before suit brought, but must be recovered by an action in the circuit court of the proper county, by summons and complaint against the county.
2. *Act giving penalty and providing special way to recover; must be strictly pursued.*—The act having provided a special way by which such penalty is to be recovered and collected, that way, and no other, must be pursued for that purpose.
3. *Outlaw; word as used in section 1 of act of 28th December, 1868, defined.*—The word "outlaw," as employed in the first section of said act, is not to be understood in the sense of that term as used in the English statutes and common law, but is to be understood as referring to the character of person or persons named in the act entitled "an act for the suppression of secret organizations of men disguising themselves for the purpose of committing crimes and outrages," approved December 26, 1868, and who by said act, while under cover of such disguise, and while in the act of committing, or threatening, or attempting to commit, the offenses therein named, are put out of the protection of the law, and may lawfully be shot or killed by any person.
4. *Same; outlawry can not be pronounced by an act of the legislature.*—Outlawry, legally speaking, is a judicial proceeding, and no one can be outlawed but in such a proceeding, and "by due process of law." An act of the legislature is not "due process of law."
5. *Act of December 28, 1868; the words "in disguise," &c., construed.*—A person "in ambush, or concealed in the bushes," is not a person in disguise, within the purview and meaning of the act first above named, and the assassination or murder of a party by a person so ambushed or concealed, does not inflict upon the county the penalty given by the first section of said act, unless said party is so assassinated or murdered "for past or present party affiliation or political opinion."

APPEAL from the Circuit Court of Dale.

Tried before Hon. J. McCALEB WILEY.

On the 28th of December, 1868, the general assembly of Alabama passed an act entitled, "an act to suppress murder, lynching, assaults, and assaults and batteries." The first, second, third, fourth and seventh sections of the act are as follows :

"SEC. 1. *Be it enacted by the General Assembly of Alabama,* That whenever, in any county of this State, any person shall be assassinated or murdered by any outlaw, or person or persons in disguise, or mob, or for past or present party affiliation or political opinion, the widow or husband of such person so murdered or assassinated, the next of kin of such person, shall be entitled to recover of the county in which such murder or assassination occurred, the sum of five thousand dollars as damages for such murder or assassination, to be distributed among them according to the laws of Alabama, regulating the distribution of the estates of intestate decedents.

"SEC. 2. *Be it further enacted,* That said damages allowed in section one of this act shall be recoverable in the following manner: The claimants shall, after the expiration of six months from the murder or assassination aforesaid, bring an action in the circuit court of the proper county, by summons and complaint against the county, alleging the murder or assassination of such person in said county by an outlaw, or person or persons in disguise, riot or mob, and that it was done at least six months before the commencement of the suit. The subsequent proceedings shall be according to the laws of the State and rules of practice in suits between individuals.

"SEC. 3. *Be it further enacted,* That if the issue shall be found for the claimants, judgment shall be rendered in their favor for five thousand dollars and costs against the county. If found for the county, the costs shall be adjudged against the claimants. When judgment is rendered for the claimants, the court shall enter, with the judgment, an order to the court of county commissioners of said county, notice of which shall be issued by the clerk of the court, and served on the probate judge by the sheriff, commanding said [court of county commissioners] within

Dale County v. Gunter.

twenty days, to assess on the State tax of said county such a per centum as will realize the amount of said judgment for damages and costs.

"SEC. 4. *Be it further enacted*, That the assessment so made shall be delivered to the tax collector of the county, who shall collect such tax, in the same manner as the State tax is collected, within sixty days.

* * * * *

"SEC. 7. *Be it further enacted*, That if at any time before the payment of the money recoverable under any section of this act, the offenders shall be apprehended and duly tried, convicted and punished, such conviction and punishment shall operate as satisfaction of the judgment in the particular case. If the offenders herein described shall be apprehended and undergoing trial for the offense about which the suit for damages is brought, the court, or in vacation, the presiding judge of the court, may, on a proper showing, suspend proceedings in the suit for damages until the result of the trial of the apprehended person shall be known."

This act being of force, as well as an act entitled "an act for the suppression of secret organizations of men disguising themselves for the purpose of committing crimes and outrages," approved December 26, 1868, (and which, for a proper understanding of the case, is sufficiently set out in the opinion,) the appellee, the widow of W. T. Gunter, brought suit against the county of Dale on the 28th of February, 1870, to recover the damages given by section one of the act of December 28, 1868, for the murder of her husband.

The first count of the complaint, after averring that plaintiff is the widow of said Gunter, &c., alleges that Gunter was murdered and assassinated in the county of Dale "by one Turner Riley, who was there and then an outlaw," and that the assassination and murder was done more than six months before the commencement of the suit, &c. The second, third, fourth and fifth counts were the same in substance as the first, with the exception that in the second count the murder or assassination was alleged

to have been done by "a person in disguise," and in the third count by "persons in disguise," in the fourth count by "a riot," and in the fifth by "a mob."

The defendant pleaded—

1st. The general issue.

2d. That the claim or demand upon which the suit is brought was not presented to the court of county commissioners of Dale county for allowance, reduction or rejection, before the commencement of the suit.

3d. That the claim or demand upon which the suit is brought has never been presented to the commissioners court for allowance, reduction or rejection.

The plaintiff joined issue on the first plea, and demurred to the second and third plea, specifying, among other grounds, that the court of county commissioners had no authority to levy a tax for the payment of said claim before it was judicially established in the mode prescribed by law; secondly, that the commissioners court had no power to allow said claim before it was judicially established in the manner prescribed by law; and the court sustained the demurrer.

The case was tried on an agreed statement of facts, which, so far as material to a determination of this cause, are as follows:

"It is admitted that plaintiff is the widow of W. T. Gunter, deceased, who also left five children him surviving; that he was killed in the county of Dale on the 27th of June, 1869, under the following circumstances: The fence on the back part of the plantation of said W. T. Gunter, deceased, on the 27th of June, 1869, was thrown down and a herd of cattle turned into the plantation. Gunter went into the plantation and drove the cattle out at the point where the fence had been thrown down, and then got over the fence, when some person in ambush, or concealed in the bushes, shot said Gunter with a load of large shot, killing him instantly. The signs of the person and of his concealment at the point where the gun was fired were about twenty steps from where deceased fell. Plaintiff

and her daughter heard the gun and saw the smoke of the same at the time when Gunter was shot. Several weeks previous to the killing of Gunter, he and one Turner Riley had a difficulty, in which said Riley shot Gunter and wounded him in the arm, and said Gunter shot at said Riley. Gunter caused Riley to be arrested on a warrant issued by a justice of the peace, and after the arrest said Gunter and Riley settled all matters between them, and Riley was not prosecuted any further; although he was put under bond to answer at the next term of the circuit court the charge of an assault with intent to murder said Gunter, and was under bond at the time of the murder. This was the only criminal charge against him in said county. Shortly after this settlement Riley declared he intended to kill said Gunter and one Barrow. Immediately after the killing of Gunter, a mule was stolen from — —, and Riley disappeared. In the fall of 1869 Riley was arrested in Corinth, Mississippi, by one Glover and a son-in-law of deceased, on a charge of murdering said Gunter, but when within a few miles of Abbeville he escaped, notwithstanding the efforts of his captors and two other men present. Riley acknowledged, while under arrest and manacled, that he had killed Gunter, and said if he was carried back to Dale county and convicted and hung for killing Gunter, he would go to hell and fight Gunter there as long as the devil would allow him to do it. Riley came to Dale county since the late war, as he said from Arkansas, and was and is regarded as being a very dangerous, reckless and bad man. Shortly after Riley's escape, plaintiff, one Haley and one Glover, published and offered a reward for the apprehension of said Riley, but Riley has never yet been arrested, tried, convicted or punished for the murder of Gunter. Dale county never offered any reward for the apprehension of Riley, nor did said county, or the officers thereof, use any diligence beyond the usual course of law to apprehend Riley and have him brought to trial and convicted. More than six months had elapsed from the time of the murder to the bringing of this suit, and no person has

Dale County v. Gunter.

been tried, or convicted and punished for the murder of
Gunter. * * * * *

Sometime after the killing of Gunter, the probate judge and sheriff of Dale county notified the governor of the death of Gunter, and that he was supposed to have been killed by said Riley, and requested the Governor to offer a reward for his apprehension, at the same time sending the governor a description of the person and appearance of Riley. Gunter was a man of violent temper; was a Confederate soldier during the war, and repeatedly said he had never taken any oath of allegiance to the United States government since the war, and never intended to; and in fact he had not done so up to the time of his death.

* * * * *

The demand upon which this suit was brought had never been presented to the commissioners court for allowance, &c.

The court, at the request of the plaintiff, charged the jury that "if they believed from the evidence that plaintiff is the widow of W. T. Gunter, deceased, and that said Gunter was murdered or assassinated in the county of Dale on or about the 27th day of June, 1869, and that more than six months had elapsed from the time of the assassination to the commencement of this suit; and that said murder was perpetrated by a person in disguise, or by one Turner Riley, and that neither said Riley nor any other person has been prosecuted or is undergoing prosecution therefor; and if they further believe the evidence in regard to the character, conduct, and declarations of said Turner Riley, as admitted in evidence, and that said Gunter was murdered or assassinated by said Riley as admitted, then they must find for the plaintiff."

To this charge defendant excepted, and brings the case here by appeal, and now assigns as error—

1st. Sustaining the demurrer to the second and third pleas of defendant.

2d. The charge given to the jury.

D. M. SEALS, for appellant.—The demurrer to the com-

plaint assigned as error ought to have been sustained. Section 909 of the Rev. Code, in relation to the bar of *all claims against counties*, which are not presented to the court of county commissioners for allowance within twelve months after they *accrue* or become payable, is *mandatory* in its character. That it applies to a case like the one under consideration, there can be no doubt, unless the act of December 28th, 1868, *pro hac vice* repeals this section of the Code, or excepts claims like this from its provisions. It is contended by appellee that said act, by implication, excludes from the operation of section 909 the necessity for the presentation of this claim. The right of Mrs. Gunter to the precise sum of five thousand dollars as damages from Dale county, immediately upon the murder or assassination of her husband, was perfect and complete, unless the county proceeded forthwith to prosecute; and hence, it was a claim against the county, and should have been presented within the time prescribed by law. It is true, that section 2 of this act says that "the claimant *shall*, after the expiration of six months from the murder or assassination, bring an action in the circuit court of the proper county, by summons and complaint against the county. What is the object of the statute in fixing the limitation of six months before the said suit can be brought? We submit that it is to allow the county at least six months within which to make payment before incurring the additional expenses incident to a suit; and if at the end of six months the county shall not have paid the said damages, the complainant may (shall) bring the suit; but, nevertheless, the claim should be presented. Section 3 of the act does not forbid this construction of the law. That section simply provides, that if a judgment shall be rendered against the county upon the suit instituted under the first section as aforesaid, that "the court shall enter with the judgment an order to the court of county commissioners of said county, notice of which shall be issued by the clerk of the court and served upon the probate judge by the sheriff, commanding said court of county commissioners, within twenty days, to assess on the State tax of said county such a per centum as

will realize the amount of said judgment for damages and costs." We insist that there is nothing in section number 3 which expressly or impliedly repeals the provisions of section 909 of the Revised Code, or removes the necessity for the presentation of this claim within twelve months.

The latter section only provides a cumulative remedy, a *mode* by which the *judgment* of the court and costs shall be collected from the county, if the claimant should be compelled to sue. Suppose this act had not provided an express mode and means by which the judgment could be made available to the claimant, would not the county still be liable and compelled to pay the judgment, which could have been rendered under the first section of this act? Without the remedy provided in said section 3, it would have been the duty of the court of county commissioners to have raised the money by taxation of the property of the county; and upon the failure or refusal to do so, *mandamus* by the circuit court would have forced the discharge of said duty. So the presentation of the claim is the duty of the claimant; the allowance of the claim, or the payment of the judgment, is the duty of the commissioners court.

Section 2276 exempts executors and administrators from being sued in their representative capacity for six months after the grant of letters testamentary or of administration. The statutes do not, in express words, make it the duty of said personal representatives to pay the debts of the estate, yet no one will deny their right to pay *before* the expiration of six months, they risking the sufficiency of assets to meet all just demands, &c. Notwithstanding suit may be brought after six months, yet the failure of a claimant to present his demand within the eighteen months makes the plaintiff liable for costs of the suit.

Under section 1396 of the Revised Code, "any person injured in person or property," by a defect in a bridge or causeway erected by contract with the county commissioners, may sue and recover damages of the county, provided no guaranty had been taken, or the period for which the guaranty had been taken, had expired. And yet this court

have held that it was the duty of the claimant to make due presentation of his claim to the court of county commissioners within twelve months of its accrual, or he could not recover.—*Barbour County v. Horn*. A person injured as aforesaid could have presented his claim, and if its allowance was refused, he could have sued immediately thereafter and recovered a judgment at the first term of the circuit court, although the twelve months had not elapsed. Under this section the damages, which may have resulted from the injury received by the defects of bridges and causeways, were not fixed by law, nor was there any mode or means by which said damages could be rendered certain as to the amount, except by proof to some competent court.

In the case now before this court, the statute made the damages a fixed and definite demand, dependent alone upon the existence of these facts, to-wit: That William Gunter had been murdered or assassinated "by an outlaw or person in disguise," within the limits of Dale county, and for which the county had failed to prosecute the offender. The right of a person injured by a defect in a bridge or causeway, was likewise dependent upon the existence of certain facts, viz: That said bridges or causeways had been erected by contract, and that either no guaranty had been taken by the county, or that the period had expired; and, further, that the injury to the person or property had resulted from said defects. It is certain that Barbour county had a perfect right at any time, even before suit, through its fiscal agent, the court of county commissioners, to have paid the claim of Horn, or to have tendered him a sufficient sum of money in full satisfaction of the damages, which would have defeated a recovery of the county.

For the protection of counties, the legislature has enacted a *general statute* of limitations, beyond which there is no liability. No special statute can contravene its provisions, except by a clearly expressed intention, or by such a certainly implied intention as leaves no doubt upon the mind of the court. Such is not the case in reference to

the effect of section 3 of the act under review. The doctrine of repeal or exception by implication is not a favorite of the courts. A county is a corporation—an ideal, intangible person, created by law, and acts only by and through certain agents. It does not, can not know of the existence of claims against it, either of the character referred to in section 1396 of the Revised Code, or of those arising under the special statute of December 28th, 1868. It is, therefore, only by the presentation of the claim to the proper officers that the county can know that it is a debtor. For which cause, it is unjust and unreasonable that a county should, by law, be made a debtor, and that very law should not afford the county an opportunity of paying the debt without a suit, which would necessarily subject it to expense and costs. Any other construction of all these statutes, than that maintained by us, does not accord with reason or authority.

The charge given is erroneous.

The whole evidence is set out in the record, in which there is not a particle of proof—neither fact nor circumstance—proving, or tending in the remotest degree to prove that said Gunter came to his death by the hand of a person in disguise. The record discloses that the fatal act was committed “by some person in ambush, or concealed in the bushes,” and “the signs of the person and of his concealment at the point where the gun was fired about twenty steps from where deceased fell.”

1st. Can “a person in ambush” be held as a “person in disguise?” “Ambush,” in its primary meaning, is a military phrase signifying “a private or concealed station, where troops lie in wait to attack their enemy by surprise;” and, secondly, it means “the state of lying concealed for the purpose of attacking by surprise; a lying in wait.”

2d. Can “a person concealed in the bushes” be regarded as “person in disguise?”

The word concealed has no other signification than that of being “kept close or secret; hid; withdrawn from sight; covered;” and hence, the person was kept close or secret,

hid—withdrawn from sight, or covered, by being “concealed in the bushes.”

“In disguise” is an expression importing a meaning entirely dissimilar to, and totally different from, either of the phrases “in ambush” or “concealed in the bushes.” The word disguised, when employed as a noun, means “a *counterfeit habit*; a *dress intended* to conceal the person who wears it.” The attempt to construe the mere *position* of “a person in ambush, or concealed in the bushes,” as synonymous with, or similar to, the mere *dress* or *mask* of “a person in disguise,” would be a wanton outrage upon good sense and logic. A “person in disguise” is one who is visible to the eye, but who can not be identified, because of the dress or mask in which he appears. A “person in ambush, or concealed in the bushes,” is one not visible to the eye, and may not be in disguise. Disguise has reference *solely* to the dress or mask assumed, by which the party can not be recognized when seen. Ambush and concealment have reference *alone* to the *position* in which the person hides himself.

The purpose, in the one instance, is to avoid recognition of his person; and in the other, to hide his person altogether.

The foregoing criticism is rendered more apt, appropriate and conclusive, when reference is had to the acts of the legislature, in which are found the terms “disguises,” “hideous and grotesque masks,” of both the men and their horses, which are worn to prevent their recognition.

Under a liberal, not to say a strict construction of this penal statute, is it possible to conclude that said Gunter was killed “by a person in disguise?” Not even the *shadow* of a difficulty lies in the way of a negative answer to this question.

2. In the second place, was said William T. Gunter killed by an outlaw? In discussing this branch of the subject, the most material question that presents itself for consideration is, what is meant by the term outlaw, contained in the act of the legislature, approved on the 28th day of December, 1868, page 444, entitled “An act to sup-

press murder, lynching and assaults and batteries?" What is the legal definition of outlaw? Before the passage of the statute under which this action was instituted, the law attached a definite, fixed and certain signification to the character of persons designated as outlaws. An outlaw was defined, in substance, to be a rebel against the State or community of which he was a member; being in contempt and contumacy in refusing to be amenable *to*, or to abide *by* the justice of that court which had lawful authority to call him before it; subject to divers forfeitures and disabilities, whereby he lost *liberam legem*, and was out of the protection of the government.—Bacon's Abridgement, vol. 7, title "Outlaw," page 326.

While outlawry in civil cases has never been known or practiced in the United States, criminal proceedings for that offense have been repeatedly instituted in, and recognized by, the American courts, even within the last forty or fifty years.

Laws of a somewhat similar character have been passed by the congress of the United States, in respect to that numerous class of citizens who engaged in the late war against said government. All persons obnoxious to these laws were, in a measure, placed beyond the protection of the courts of the country, until they availed themselves of the provision of pardon and amnesty held out to them by the government. The most of these congressional enactments have been acquiesced in for seven or eight years, and have not been declared void for unconstitutionality by the highest judicial tribunal of the land. Nearly all the Southern States, after reconstruction under the laws of congress, imposed disabilities on certain classes of citizens, which deprived them of some rights and privileges. In addition to which, the State of Alabama has enacted two statutes in reference to the offense of the same character as outlawry, and which this court have held not to be in conflict with the organic law of the State.—Acts of 1868, pages 444 and 453; *Gunter v. Dale County*, decided at June term, 1870.

There is nothing in the constitution of this State, or of

the United States, in the way of the recognition of the common law right to outlaw a citizen for crimes against *laws already prescribed*, and for the government to withdraw its protection from those who persistently and contumaciously refuse to yield their allegiance to the government; for, in the language of the opinion of our own supreme court in this very case, "protection and allegiance are reciprocal." At common law the odious character known as outlaw forfeited his right to the protection of the law, by withholding his obedience thereto, and by his acts of rebellion and contumacy. The same principle is recognized under our form of government, and has been asserted, as before seen, by this very court. The very word outlaw readily conveys its own meaning.

The inhibition in the constitution of the United States against the passage of "bills of attainder" and "*ex post facto* laws" is no barrier to the recognition of technical outlawry of the common law in criminal proceedings, when they are made to conform to the rules and practice of the American system of jurisprudence. Nor are the foregoing views obnoxious to the objection urged by the appellee in respect to the constitutional prohibition. "A bill of attainder is a legislative act which inflicts punishment without a judicial trial."—*Cummings v. The State of Missouri*, 4 Wallace, 277. The case of *Dreman v. Stifle*, in same report, shows what legislation is not in the nature of a bill of attainder.—4 Wallace, 595. The difficulty suggested by the appellee is more formidable to him than to the appellant; for it is an obstacle in the way of regarding Riley as an outlaw without a *conviction* of outlawry. He may be *in fact* an outlaw as at common law, still he can not be so regarded *in law* until so declared by a court.

If the offense known as outlawry is to be ascertained by reference to the authorities, before Riley can be considered an outlaw, and before it could be properly alleged in the complaint that he was an outlaw, he should have been so declared by a court of competent jurisdiction. By law, no person can be outlawed without due notice, nor should he be held, regarded or punished as such, "*nisi per legem ter-*

rae;" or, in the words of our constitution, his rights should be forfeited "by due course of law," before its protection can or will be withdrawn from him.—7 Bac. Abr. pp. 239, 350, (c) 353, 354, 358; Constitution of Alabama, § 3.

The two acts were passed by the same legislative body; were under consideration at the same time, and were approved by the governor within two days of each other; and hence both these statutes may be taken together, in *pari materia*, to ascertain the mind of the law making power. This is the usual and legitimate mode of construing legislative enactments.

Tested by this rule, the laws of Alabama recognize such a *character* as outlaw, and withholds its protection from him. Does the description of Turner Riley's character, as contained in the record, show him to have been an outlaw within the meaning of these statutes?

The evidence recites, that said Riley was, and is regarded by those who knew him, as being "a very dangerous, reckless and bad man," that he came from Arkansas; had had a previous difficulty with said Gunter, in which he had wounded him and that Gunter at the same time shot at Riley; that Riley had entered into bond for his appearance at the next term of the circuit court of Dale county, to answer the offense of assault with intent to murder said Gunter, growing out of said difficulty; that the difficulty had been adjusted between them, and that afterwards, (for a cause not stated,) Riley had threatened to kill said Gunter. Do these characteristics come up to the measure necessary to constitute Riley an outlaw? It should be borne in mind, that the word outlaw is contained in only *one* of these acts, to-wit, that which gives the right of action under which the appellee recovered in the court below. The first section of the act last named alone uses the word "outlaw." If this act alone reflected the legislative mind upon this subject, it would be clear that the term outlaw could bear no other meaning than that which the common law, of force in this State, attached to it. But when the previous legislation of the State, of a kindred character, is considered in connection with this statute, it will appear that there is

one class of persons denounced therein, from whom the protecting ægis of the law is withheld, and who, for *that reason*, can well be denominated outlaws. At the same session of the legislature, and two days prior to the approval of the law "for the suppression of murder," &c., an act was passed "for the suppression of secret organizations of men *disguising* themselves for the purpose of committing crimes and outrages." The preamble defines the object had in view in the enactment of that seemingly harsh measure of preventive justice.

[Here appellant's counsel commented at length on the act of December 26th, 1868, referred to in the opinion, and particularly the second section.]

This section renders it too clear for argument to demonstrate what class of persons this law denounces as outlaws, and defines it to be "persons away from their usual residences, *disguised* by masks, or otherwise, so as not to be easily recognized." Would "a person in ambush or concealed in the bushes" answer this description? "In ambush" conveys but one idea; disguised in ambush conveys not only one, but two ideas—that he was both masked and lying in wait; "concealed in the bushes" likewise conveys but one idea—that of his person being hidden; "disguised in the bushes" would indicate that his person was not concealed, but that his disguise prevented the identification of his person.

In view of the highly penal character of this act, and the duty of the courts to construe it with the utmost strictness, we do not hesitate to affirm that there can not be even the shadow of a pretense that Turner Riley was an outlaw. The most liberal, loose and latitudinarian construction of the statute can not, from the evidence, force the conclusion that he is an outlaw under the statutory enactments of the State. It would be a solecism, a misnomer, an outrage upon language to consider him an outlaw, when the evidence fails to show that he was disguised, and when the only evidence of character adduced showed him to be "a very dangerous, reckless and bad man." The evidence shows that, just before the fatal occurrence, he

had submitted himself in obedience to the laws of the country, whose courts had jurisdiction of him.

The court could not judicially know that the term under discussion had a signification different from that which the law gave to it, and different from that of the standard authorities employed by the people to distinguish the meaning, sense and import of the words of the language which communicated their ideas, thoughts and sentiments. It is, therefore, a legal as well as philological absurdity to call Turner Riley an outlaw.

Again : Suppose it should be asked, if persons in disguise were intended by the statute to embrace the term outlaw, why did it, also, include the very word itself? And what office is left for the word outlaw to perform? We answer, in the first place, it is not at all improbable that the legislature intended its legal and well defined meaning as recognized in the American courts ; or we may rationally conclude from the two statutes that the legislative mind regarded any persons as outlaws who threw down the bulwarks of the law, denied their allegiance, defied and overrode the civil authorities, and from whom the law held back its protection, by allowing them to be shot, wounded, or killed with impunity ; and that *outlaws* and such characters were regarded as synonymous terms.

In this manner all the words of both statutes can have their due signification, as well as perform their legitimate functions and have an appropriate field for their operation ; and then the law can be made to harmonize with itself in all its parts. Any other theory would convict the legislature of ignorance and stupidity.

The charge of the court below in relation to the perpetration of the murder by a person in disguise, was entirely abstract, there being no evidence to support it, and was well calculated to mislead and distract the jury, and therefore erroneous, and was certainly injurious to the appellant. The charge was also erroneous, because it submitted to the jury the decision of a question of law, in instructing them to find a verdict for plaintiff if Gunter was *murdered* or *assassinated* by some person in disguise, or by said Riley.

Dale County v. Gunter.

The charge of the court should have been qualified by explanation of the facts which constitute murder or assassination. The jury was competent to decide the fact of the killing, which was but one ingredient of murder or assassination. Without appropriate instructions as to these three distinct ingredients of murder, the jury was not lawfully authorized to find that said Gunter was murdered or assassinated, viz :

1. That William T. Gunter had been deprived of his life.
2. That he was killed unlawfully.
3. That he was killed both unlawfully and with malice, and a statement of what facts constitute malice, or from which it may be inferred.

W. C. OATES, for appellee, argued the case elaborately at bar, but no brief of his argument came into Reporter's hands.

PECK, C. J.—But two questions need be considered in disposing of this case. First. Is the cause of action disclosed in the complaint a claim required to be presented to the court of county commissioners, to be allowed or rejected by said court before suit brought? Second. Do the facts admitted and agreed upon by the parties prove that the plaintiff's husband, William T. Gunter, was murdered or assassinated by an outlaw, or by a person or persons in disguise, or by a mob, within the purview and meaning of the first section of the act entitled "An act to suppress murder, lynching and assaults and batteries," approved December 28, 1868, Book of Acts, p. 452, *a*.

First.—Sections 907–8–9 of the Revised Code are as follows : § 907 declares that "the court of county commissioners must, in term time, audit all claims against their respective counties ; and every claim, or such part thereof as is allowed, must be registered in a book kept for that purpose ; and the judge of probate must give the claimant a warrant on the treasury for the amount so allowed."

Section 908 says : "If the claim is rejected, or not allowed in full, the claimant may withdraw the same." And

section 909 enacts, that "all claims against counties must be presented for allowance within twelve months after the time they accrue or become payable, or the same are barred, unless holden by minors or lunatics, who are allowed twelve months after the removal of such disability."

The interpretation of these sections is, 1st that such claims only are required to be presented to the court of county commissioners as the said court is competent to allow, and when allowed, may be paid out of the funds of the county that may be in, or come to the treasury thereof, by a warrant of the judge of probate in favor of the claimant on the same; 2d, that if such a claim, when presented, is rejected, or not allowed in full, the claimant may withdraw the same, and may then proceed to collect such claim in the usual way, by suit against the county; but 3d, that no suit can be maintained against the county on any such claim, until the same has been presented for allowance, and if not presented within twelve months after the same accrues, or is payable, then such claim is barred, (saving the rights of minors and lunatics,) and ceases to be a claim that the county is legally bound either to allow or pay by warrant on the treasury, or in any other way.

If a claim is given against a county by statute, and no mode is prescribed for its payment, then it must be presented for allowance like other claims, and paid out of the county treasury in the usual way, by a warrant of the judge of probate. If such claim, when presented, is rejected, or not allowed in full, then it may be collected by suit against the county, as other claims are collected that have been presented and rejected, or allowed only in part. But, on the contrary, if the statute by which the claim is given prescribed the way in which the claim is to be collected, and how the means are to be obtained by which it is to be paid; then the claim must be enforced and paid in the mode and manner provided, and in no other way.

The claim in this case is peculiar in its character, and is given by the first section of the act above referred to. It enacts that "whenever in any county in this State, any person shall be assassinated or murdered by any outlaw,

or person or persons in disguise, or mob, or for past or present party affiliation or political opinion, the widow or husband of such person so murdered or assassinated, the next of kin of such person, shall be entitled to recover of the county in which such murder or assassination occurred, the sum of five thousand dollars as damages for such murder or assassination, to be distributed among them according to the laws of Alabama regulating the distribution of the estates of intestate decedents."

The second section provides how these damages are to be recovered, to-wit, by an action in the circuit court by summons and complaint, and not by presenting them to the court of county commissioners, as a claim against the county.

The third section declares how the judgment, when recovered, shall be provided for and paid, and says: "When judgment is rendered for the claimants, the court shall enter with the judgment, an order to the court of county commissioners of the county, notice of which shall be issued by the clerk of the court, and served on the probate judge by the sheriff, commanding said court [of county commissioners] within sixty days to assess on the State tax of said county such a per centum as will realize the amount of said judgment for damages and costs." The fourth section enacts that "the assessment so made shall be delivered to the tax assessor of the county, who shall collect the same as the State tax is collected, within sixty days."

Here we see the legislature has provided how these damages shall be recovered, and the way and means by which they are to be paid.

It seems to me, giving the language here used its clear and manifest meaning, that these damages are not to be presented to the commissioners court, but can only be recovered by suit, and when judgment is rendered for the plaintiff, it is not to be paid by a warrant of the judge of probate on the county treasury, nor is it to be collected like ordinary judgments, by execution, but in the mode prescribed by the third and fourth sections of said act. It

is unnecessary to inquire into the purpose or policy of the legislature in prescribing the remedy and means of payment in such cases. The law being plain, it is the duty of parties and the courts to obey it, unless it is in conflict with some fundamental law of the land ; but I do not understand any objection of this sort to be made against this statute. To my mind, however, the purpose or policy of this law is by no means obscure. In the first place, the legislature intended the question, whether the assassination or murder was perpetrated by an outlaw, or by a person or persons in disguise, or by a mob, should be inquired into and determined by a jury, and not by the court of county commissioners. It is a question rather of fact than of law, and, therefore, peculiarly proper for the consideration of a jury. Such a trial is required for the security and protection of both parties, the county, as well as the plaintiff. When the fact and character of the assassination or murder is ascertained, the law itself fixes the amount of the damages ; it is five thousand dollars, and the jury can find neither more nor less.

In the second place, the manner of payment is obviously intended to operate in the nature of a penalty and punishment upon each individual tax-payer in the county, according to the value of his property, and by this means to bring home to each individual the importance of using his influence to promote a humane and just public sentiment ; a public sentiment that will not only discourage and make violence and crime disreputable and disgraceful, but also stimulate every member of the community to be active to ferret out and bring to punishment violators of the laws and disturbers of the peace and good order of society. For these reasons, we hold that the plaintiff's demurrer to the second and third pleas was properly sustained.

2. The second question to be considered is, do the facts admitted and agreed upon prove that the plaintiff's husband was assassinated or murdered by an outlaw, or by a person or persons in disguise, or by a mob, within the purview and meaning of the first section of the said act of the 28th of December, 1868 ?

The difficulties surrounding this question are, in determining who is an outlaw, within the meaning of this section of said act, and what we are to understand by the phrase there used, "person or persons in disguise." As to the word "mob," no trouble need be taken about it, as it is not claimed that the plaintiff's husband was assassinated or murdered by such an assemblage of persons, or that he was assassinated or murdered for "past or present party affiliation or political opinion."

In examining this question, thus narrowed down, it must not be forgotten that the penalty inflicted by this section on a county is not inflicted for any or every assassination or murder, but only when the assassination or murder is perpetrated by an outlaw, or by a person or persons in disguise.

The word "outlaw," as used in that act, does not mean an "outlaw" in the common law sense of that term. If it does, then I am prepared to hold that there is, and can be, no such outlawry in this State.

By the common law, an outlaw is one who has been so declared by the judgment of a court of justice, in some regular proceeding for that purpose; and this could take place in either a civil or criminal proceeding.—Bl. Com., Wendell's, 3d vol., 283-4, 319; Bacon's Abr. 3d vol., title *Outlawry*, 746. This author says: "Outlawry is a punishment inflicted on a person for a contempt and contumacy, in refusing to be amenable to, and abide by, the justice of that court which hath lawful authority to call him before them; and is a crime of the highest nature, being an act of rebellion against that state or community of which he is a member. So doth it subject the party to divers forfeitures and disabilities; for thereby he loseth *liberam legum*, is out of the king's protection," &c. In a civil case, outlawry puts a man out of the protection of the law, so that he is incapable to bring an action for the redress of injuries; and it is also attended with a forfeiture of all his goods to the king.—3 Bl. Com. 283-4. The punishment for outlawry upon indictment for a misdemeanor, is the same as for outlawry upon civil actions; but outlawry in

treason or felony amounts to a conviction and attainder of the offense charged in the indictment, as much as if the offender had been found guilty by his country.—4 Bl. Com. 320.

Outlawry by the common law, if not inconsistent with the letter of our bill of rights, is so with its spirit. 1. It not only puts a man out of the protection of the law, but also renders him incapable to bring an action for redress of injuries. This is in conflict with the 15th section of the bill of rights, which declares that “all courts shall be open, that any person for any injury done him in his lands, goods, person or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial or delay.” 2. It works forfeiture of goods, and in case of treason or felony, of lands also. This is repugnant to the 21st section of the bill of rights, which says that “no person shall be attainted of treason by the general assembly,” and that “no conviction shall work corruption of blood, or forfeiture of estate.” If there can be no forfeiture of estate on a conviction for treason, certainly there can not be on conviction for any less offense.

Anciently, an outlawed felon was said to have *caput lupinum*, and might be knocked on the head like a wolf by any one that should meet him; but to avoid such inhumanity, since Bracton’s time it has been otherwise, and to kill an outlawed person wantonly is murder.—4 Bl. Com. 320.

By *magna charta* it is ordained that no freeman shall be outlawed, that is, put out of the protection and benefit of the law, but *according to the law of the land*.—1 Bl. Com. 142; 2 Part. Coke’s Institutes, 46.

In England there are statutes, and an ancient and well settled practice of the courts, according to which a man may be outlawed; but where, in this country, do we find any statutes or practice of the courts, by which a man in either a civil or criminal case, can be outlawed according to the law of the land? I know of none. The English common law and statutes, on this subject of outlawry, have

never been recognized, or in any wise adopted in this State, and the whole system is inconsistent with our institutions, and repugnant to our constitution and laws, and is without any force among us.

We must, therefore, look somewhere else for the meaning of the word outlaw, as employed in the act of the 28th December, 1868. That is the only statute, so far as I know, in which this word is used, and, if possible, we must find a meaning for it not inconsistent with the constitution. Such a meaning, I think, is found in the act of the 26th of December, 1868, approved only two days before the act last named, and upon a kindred subject, entitled "An act for the suppression of secret organizations of men disguising themselves for the purpose of committing crimes and outrages."—Acts 1868, 444. The preamble to this act recites that "whereas, there is in the possession of this general assembly ample and undoubted evidence of a secret organization, in many parts of this State, of men who, under the cover of masks and other grotesque disguises, armed with knives, revolvers and other deadly weapons, do issue from the place of their rendezvous, in bands of greater or less number, on foot or mounted on horses, in like manner disguised, generally in the late hours of the night, to commit violence and outrages upon peaceable and law abiding citizens, robbing and murdering them upon the highway, and entering their houses, tearing them from their homes and the embrace of their families, and with violent threats and insults inflicting on them the most cruel and inhuman treatment; and whereas, this organization has become a wide-spread and alarming evil in this commonwealth, disturbing the public peace, ruining the happiness and prosperity of the people, and in many places overriding the civil authorities, defying all law and justice, or evade detection by the darkness of night, and with their hideous costumes," &c. By the second section of this act it is declared that "any person or persons found away from the place of their usual residence, disguised by mask or otherwise, so as not to be easily recognized, who shall commit, or threaten to commit, any assault or assault

and battery, or any violence upon the person of another, or any trespass on the property or premises of another, shall be held guilty of a felony, and his disguise shall be sufficient evidence of his evil intent and of his guilt, and on conviction shall be fined one thousand dollars, and be imprisoned in the penitentiary not less than five years and not more than twenty years, at the discretion of the court trying the same; and any one who may shoot, or in any way kill or wound such person while under the cover of such disguise, and while in the act of committing, or attempting, or otherwise, to commit such violence or trespass, shall not be held guilty, before the law, of any offense against such person, or the State, or be made to suffer any penalty for such act."

Here we have a certain description and character of persons who, when disguised by masks or otherwise so as not to be easily known, commit or threaten to commit certain offenses while so disguised, and it is made lawful for any one to shoot, or in any way to kill or wound them, while in the act of committing, or threatening to commit, such offenses, and the person slaying or wounding them is declared not to be guilty, before the law, of any offense against such person, or the State, or to be made to suffer any penalty for such act. This, in a very untechnical, loose and indeterminate sense, may be said to be a kind of outlawry. By this I do not intend to be understood as holding that any one can be, in any proper and legal sense, outlawed by a legislative enactment; that can only be done in a judicial proceeding, and "by due process of law." An act of the legislature is not "due process of law." Due process of law, means a proceeding "by indictment or presentment of good and lawful men, where such deeds be done, in due manner, or by writ original, of the common law."—2 Institutes, 50; *Dorman v. The State*, 34 Ala. 220-237; *Weaver et al. v. Lapsley*, 43 Ala. 232.

It is in this loose sense we must find the meaning of the word outlaw, as it is employed in the said act of the 28th of December, 1868, otherwise it must be treated as with-

out meaning; and with this meaning it adds nothing, in reality, to the force and effect of the act. It was, no doubt, employed by the legislature without any very definite idea or comprehension of its true meaning, and to add a sort of force and strength to the expression "person or persons in disguise," having reference to the act for the suppression of secret organizations of men disguising themselves for the purpose of committing crimes and outrages. Both these expressions, then, as there used, must be held to mean substantially the same thing; and so it comes to this: does the evidence admitted and agreed upon prove that the plaintiff's husband was assassinated or murdered by a "person or persons in disguise?" This question, after the maturest reflection, I feel constrained to answer in the negative.

The evidence of the plaintiff, as stated and admitted, says the plaintiff's husband was shot by some person in *ambush*, or *concealed in the bushes*. The noun *ambush* means, 1st, the act of attacking an enemy unexpectedly from a concealed station; 2d, a concealed station, where troops or enemies lie in wait to attack by surprise; an ambuscade; 3d, troops posted in a concealed place, for attacking by surprise. The verb *ambush* means, to lie in wait; to surprise; to place in ambush. *Conceal* means, 1st, to hide, or withdraw from observation; 2d, to withhold from utterance or declaration. The synonyms of conceal are, to hide; disguise, dissemble; secrete. To hide, is generic; conceal, is simply not to make known what we wish to secrete; disguise, or dissemble, is to conceal by *assuming some false appearance*; to secrete, is to hide in some place of secrecy. A man may conceal facts, disguise his sentiments, dissemble his feelings, or secrete stolen goods. The verb *disguise* means, 1st, to change the *guise or appearance of, especially to conceal by an unusual dress*; to hide by a *counterfeit appearance*; 2d, to affect or change by liquor; to intoxicate. The noun *disguise* means, 1st, *a dress or exterior put on to conceal or deceive*; 2d, artificial language or manner, assumed for deception; 3d, change of manner by drink; slight intoxication. This learning I

derive from Mr. Webster, and I am satisfied with it. I can hardly conceive of things better distinctly marked and different, than that of a person or persons in ambush, or concealed in the bushes, where a person so concealed lies in wait to attack by surprise ; and a person or persons in disguise, or disguised by *an unusual dress*, or, in the language of the preamble to the act, to suppress secret organizations of men disguising themselves for the purpose of committing crimes and outrages, by the use of masks, hideous costumes, and other grotesque disguises. If I were to write a dozen pages on this subject, I should probably not be better understood than I am now, and certainly I should not be more thoroughly convinced myself. My conclusion is, that the written charge of the court, given at the request of the plaintiff, is not sustained by the evidence, and should have been refused.

Let the judgment be reversed and the cause remanded, at the appellee's cost.

FULGHAM vs. THE STATE.

[ASSAULT AND BATTERY BY HUSBAND UPON WIFE.]

1. *Husband ; power of to correct wife.*—In this State the husband can not commit a battery upon his wife, by way of inflicting upon her "moderate correction" in order to enforce obedience to his just commands. (PECK, C. J., *dissenting*.)
2. *Same.*—The authority for "wife whipping" rests upon a relic of a barbarous and unchristian "privilege," which, even in the mother country, was never claimed to be law, except among people of the "lower rank." The law in this country recognizes no such distinction.

APPEAL from Circuit Court of Greene.
Tried before Hon. CHARLES PELHAM.

THIS was an indictment of the husband for an assault and battery upon his wife. The indictment charges that before the finding thereof, "George Fulgham assaulted and beat his wife, Matilda Fulgham, against the peace," &c. Appellant went to trial on plea of not guilty, and was convicted and fined.

From the bill of exceptions, it appears that the accused was chastising one of his children, when the wife remonstrated, thinking the punishment excessive. The child ran, pursued by the father, and both followed up by the wife. When the wife came up with her husband, he struck her twice on the back with a board, and she returned the blows with a switch. The blows inflicted on the wife made no permanent impression. Both were high tempered, and were emancipated slaves, and were husband and wife.

This being all the evidence, the court charged the jury that "if they believed that defendant struck his wife with a board, as described in the evidence, in anger, and not in self-defense, he was guilty of an assault and battery; that words of provocation and abuse by the wife, if she used any at the time of the fight, would, under the statute of Alabama, be in justification or extenuation, as they might see fit." The defendant excepted to this charge, and requested the court to charge the jury that "a husband can not be convicted of a battery on his wife unless he inflicts a permanent injury, or uses such excessive violence or cruelty as indicates malignity or vindictiveness." This charge the court refused to give, and "further charged that the proposition that a husband could moderately chastise his wife, was a relic of barbarism, and no part of the law of Alabama, although it might be of North Carolina or Mississippi. To the refusal to give the charge asked, and to the remark above, defendant excepted."

The charges given, and the refusal to give the charge asked, are now assigned as error.

R. CRAWFORD, for appellant.—The first charge asked should have been given.—1 Winslow, (N. C.) p. 1, case No.

266; *Calvin Bradley v. State*, Walker Miss. Rep. p. 157; 2 Dev. & Bat. 365; 2 Humphries, 283; 27 Ala. 222.

The closing remark and charge of the court *mero motu* was erroneous, and prejudicial to appellant.—*Wicks v. State*, 44 Ala.

The first original charge given by the court was incomplete, and tended to mislead the jury.

ATTORNEY-GENERAL, *contra*.—1. The court did not err in charging the jury that a blow given in anger, and not in self-defense, is an assault and battery.—1 Bish. Cr. Law, § 409; 2 *ib.* § 63. But that opprobrious and abusive words given by the person assaulted, might be considered in extenuation or justification of the offense.—Revised Code, § 4198.

2. A married woman is as much under the protection of the law as any other member of the community. And the old doctrine of the common law, that a husband might moderately chastise his wife, was never in force in Alabama, and since the reign of Charles the Second has been exploded in England.—1 Bl. Com. 445; Schouler on Dom. Relations, 59.

The statement by the court of the difference between the laws of North Carolina and Mississippi and those of Alabama, is not error.

PETERS, J.—This is a criminal prosecution by indictment upon a charge of assault and battery by the husband upon the person of the wife. The defense relied on by the accused is, that a husband may give his wife moderate correction in order to secure her obedience to his just commands.

This authority, on the part of the husband, to chastise the wife with rudeness and blows in order to coerce her obedience to his domestic commands, was not admitted in the age of Judge Blackstone, or as he says, “in the polite reign of Charles the Second,” *except* among “the lower rank of the people, who were always fond of the old common law,” by which “they claim and exert their *ancient*

privilege" to give their wives "moderate correction," to secure subordination in the family.—4 Bl. Com. 444, 445, marg. page. It will be seen from this reference, that this eminent and classic commentator on the law of England confines this brutal and unchristian "privilege" wholly to the "lower rank of the people." The most zealous advocates of "wife-whipping" have never gone beyond this unhappy rank. It has never been contended that this liability to be corrected with blows and stripes was the law for the wives of all the people—of those of the higher as well as those of the lower rank. The language of the authority relied on by the learned counsel for the accused, clearly shows that there was a rank of the people excluded from its operation. Such partial laws can not be enforced in this State. The law for one rank is the law for all ranks of the people, without regard to station. Judge Blackstone calls it merely an *ancient privilege*, and quotes no decided case, and possibly none such could then be found, which supports the privilege referred to by him, as an universal law. This distinguished author published his commentaries above one hundred years ago, when society was much more rude, out of the towns and cities in England, than it is at the present day in this country; and the exercise of a rude privilege there is no excuse for a like privilege here. If it was, the offense of witchcraft and sorcery, which were crimes at common law, and most cruelly punished against the voice of both reason and religion, might be indicted here.—4 Bl. Com. p. 60. Since then, however, learning, with its humanizing influences, has made great progress, and morals and religion have made some progress with it. Therefore, a rod which may be drawn through the wedding ring is not now deemed necessary to teach the wife her duty and subjection to the husband. The husband is therefore not justified or allowed by law to use such a weapon, or any other, for her moderate correction. The wife is not to be considered as the husband's slave. And the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her

like indignities, is not now acknowledged by our law.—*Turner v. Turner*, 44 Ala. 437; *Goodrich v. Goodrich*, 44 Ala. 670; *Moyler v. Moyler*, 11 Ala. 620; *Saunders v. Saunders*, 1 Rob. Ec. R. 549. The husband may defend himself, his children, and those relations whom the law permits him to defend, against the violence of the wife. 12 Ala. 587; 1 Bish. Cr. Law, 341. But in person, the wife is entitled to the same protection of the law that the husband can invoke for himself. She is a citizen of the State, and is entitled, in person and in property, to the fullest protection of its laws. Her sex does not degrade her below the rank of the highest in the commonwealth.

Speaking of the duty of the husband to the wife, a late expounder of the law of this great relation declares that he "is bound to love his wife and to bear with her faults, and if possible, by mild means to correct them."—Schouler Dom. Rel. 59; 1 Bouv. Law Dict. 675, *Husband*; *Goodrich v. Goodrich*, 44 Ala. 670. This is the voice of the law, and the voice of politeness and humanity, and I think also the voice of religion, which is, after all, but pure and disinterested love.—St. Paul's Epists. *ad* Corinths., *ubique*.

Besides this, the constitution has wisely and justly extended the protective power of the State to all its people alike. Its shield is stretched out over the high and the low, the rich and the poor, the strong and the weak, the wise and the simple, the learned and the unlearned, and the good and the bad, without distinction of rank, caste or sex. All stand upon the same footing before the law, "as citizens of Alabama, possessing equal civil and political rights and public privileges." And no special "privilege" to any rank of the people is allowed to exist in this State, because such a privilege is forbidden by the fundamental law.—Const. Ala. 1867, Art. I, §§ 2, 32; *Dale v. Governor*, 3 Stew. 387. I therefore think that the common law of "wife whipping" among "the lower rank of people" in Great Britain, has never been the common law of this State. It is, at best, but a low and barbarous custom, and never was a law.

The husband may exercise over the wife "gentle re-

Brown et al. v. The State.

straint."—2 Kent, 181. And he may have security of the peace against the wife, and the wife against him.—4 Bla. Com. 445. And they may be indicted for assault and battery upon each other.—*Bradley v. The State*, Walker R. 156. But beyond this, "the rule of love has superseded the rule of force."—Schoul. Dom. Rel. 59.

There was, then, no error in the charge given, or in refusing the charge asked. Therefore, let the judgment of the court below be in all things affirmed. •

PECK, C. J., *dissenting*.

BROWN ET AL. vs. THE STATE.

[MOTION TO RE-TAX COSTS ALLOWING SOLICITOR'S FEE AGAINST EACH OF SEVERAL DEFENDANTS.]

1. *Solicitor's fee, how taxed when several defendants found guilty.*—On the conviction of several defendants on an indictment for disturbing religious worship, but one solicitor's fee can be taxed against all the defendants found guilty, as a part of the costs.—Rev. Code, § 4343.

APPEAL from Circuit Court of Henry.
Tried before Hon. J. McCaleb Wiley.

The facts appear in the opinion.

W. C. OATES, for appellant.
ATTORNEY-GENERAL, *contra*.

(No briefs came to the Reporter's hands.)

PETERS, J.—This is a motion to retax the costs in a criminal prosecution by indictment for disturbing religious worship, so as to allow but one solicitor's fee against several defendants, instead of a solicitor's fee against each of

several defendants. The record shows that several persons were indicted in the court below for disturbing religious worship, under section 3612 of the Revised Code. There is but one count in the indictment, and the defendants for plea "severally say they are not guilty." On this plea the parties went to trial by a jury. And the verdict of the jury is, that they "find the defendants guilty, and assess a fine of twenty dollars each." And thereupon each of the defendants came into open court and "confessed judgment for the fine and costs against them." And on settling the bill of costs in the court below, the clerk taxed a solicitor's fee of \$37.50 against each of the defendants who had confessed judgment for the fine and costs as above said. The defendants made their motion, in the court below, to have said costs re-taxed, so as to allow but one solicitor's tax fee against all of the defendants against whom judgments were rendered, instead of a tax fee against each of said defendants. This motion the court refused, and the defendants excepted and appealed to this court.

And the sole question made in this court is, whether, upon a conviction on an indictment for disturbing worship, where several persons are charged, the solicitor is entitled to a tax fee against each one of the defendants, or to one tax fee against all? The answer to this inquiry depends on the construction of the law of the Revised Code which gives a right to a solicitor's fee in such a case as this. That portion of this law necessary to be considered here, is in these words: "Solicitors are entitled to the following fees, to be taxed as costs against the defendant *on conviction*, and if he is insolvent, to be paid out of the fines and forfeitures in the county treasury"—that is to say, * * * "For *each conviction* under sections 3598 (51), 3599 (58), 3612 (71), 3617 (75), 3618 (76), 3619), 3730 (183), or 3731 (184)..\$37.50."—Rev. Code, § 4343. Section 3612 of the Revised Code contains the statute forbidding the disturbance of religious worship, under which the defendants in said motion were found guilty. The language of the Revised Code is different from that of the Code allowing so-

licitor's fees. The law of the Code is, "Solicitors are entitled to the following fees, to be taxed as costs and collected from *each defendant*." . . . "From *each defendant convicted* under sections," &c.—Code, § 3996. The language of the Code is perfectly clear. There can be no doubt about it. "Each defendant" is liable to pay a solicitor's tax fee on conviction. But the Revised Code rests the liability on "each conviction." A conviction may be of one, or many defendants. The number of the persons charged and found guilty does not give plurality to the conviction. And where the conviction is single, there can be but one solicitor's fee allowed. This is the language of the law. About this there can be no rational doubt. A conviction means to put the matter beyond controversy, just as the verdict of a jury is supposed to do. This is done when the jury declare their verdict. If the parties are found guilty they are convicted, and this is a conviction.—Riddle's Lat. Dict. p. 337, word *Convinco* ; Bla. Com. p. marg. 362, 363. In such a case, the conviction is equivalent to the verdict. It precedes the judgment or sentence, and must be regarded as a unit, however numerous the defendants may be.—1 Bouv. Law Dict. p. 362, word *Conviction* ; 1 Cain's R. 72 ; 34 Maine, 594 ; 16 Ark. 601. This construction is also in conformity with the previous decision of this court.—*Dent v. The State*, 42 Ala. 514. Here there is but one prosecution, one indictment, one charge in this indictment, one plea in answer to it, one jury to try this plea, one verdict and one bill of costs. If we consider this verdict as the conviction, as I think we must, upon authority of the cases above cited, then there is also but one conviction. The judgment of the court is not properly a conviction, but it is the sentence of the law giving effect to the conviction ; because there may be conviction and the judgment may be arrested. This could not be, if the conviction and the judgment were the same.—1 Din. Cr. Cases, 568 ; 14 Pick. 88 ; 8 Wend. 204 ; 3 Park. Crim. 567. The conviction or verdict may be a single act, and consequently a unit, while the judgment may be several, as in this case. Beside, this is a statute not to be expounded

by construction. It must be strictly construed; that is, confined to its narrowest limits.—Rev. Code, § 3534. Here the allowance of one solicitor's tax fee lies within the direct expressions of the statute, and a strict construction requires that it shall be kept within this limit.—Leiber Leg. and Pol. Herm. 20; 20 Wend. 561; 1 Whea. 326.

The ruling of the court below is therefore set aside and annulled, and the cause is remanded, with instructions to re-tax the costs in the case named in said motion so as to allow but one solicitor's fee against all the defendant's found guilty in the court below, and no more, in conformity with this opinion.

GREGORY vs. THE STATE.

[AMENDMENT OF INDICTMENT.]

1. *Indictment, amendment of; when error.*—To permit an indictment to be amended, on motion of solicitor, even in an immaterial matter, without the consent of the defendant and against his objection, is an error for which the judgment will be reversed.

APPEAL from City Court of Montgomery.

Tried before Hon. J. D. CUNNINGHAM.

THE facts are as follows: At the July, 1870, term of the city court of Montgomery, an indictment was found against the appellant for living in adultery, &c. The indictment, in its caption, gave the title of the court as the "city court." No other title appeared elsewhere in said indictment. Appellant demurred to the indictment for its failure to state in what court it was found. The demurrer was sustained, and the State moved to amend by inserting after the words "city court," in said indictment, the words "of Montgomery," which motion was granted, against the objection of

Gregory v. The State.

appellant. To the allowance of the motion to amend appellant excepted, and here assigns the same as error.

FITZPATRICK, WILLIAMSON & GOLDTHWAITE, for appellant. "Caption," as used in section 4111, means the heading of the indictment, and is a part of it that must be returned by the grand jury.

In this indictment the name of the court did not appear correctly, either in the caption or body. It was, therefore, defective, and the court properly sustained the demurrer. The defect, established by sustaining the demurrer, was one that could not be amended except by consent of defendant, and in permitting the amendment, against the consent of defendant, the court erred.

Even if the indictment had been good, yet, when the court sustained the demurrer, the indictment was gone, and could not be restored except by defendant's consent. The amendment, against defendant's protest, was in effect a finding by the *court* of a new indictment.

JOHN W. A. SANFORD, Attorney-General, *contra*.

PECK, C. J.—We do not think it necessary to determine whether the demurrer to the indictment might not have been overruled without error, but, being sustained, the court below thereby held it to be insufficient.

An indictment is the act of the grand jury, and should be held to be inviolable. To permit it to be amended, even in a matter that might seem to be immaterial, without the consent, and against the objection of the defendant, would be a dangerous practice, that, so far as we know, has never received the sanction of this court.

Section 4143 of the Revised Code says, "an indictment may be amended with the consent of the defendant, when the name of the defendant is incorrectly stated, or when any person, property, or matter, therein stated, is incorrectly described." We think this equivalent to a declaration, on the part of the legislature, that an indictment can not be amended in any case, without the defendant's consent.

We therefore feel constrained to reverse the judgment of the court below, and to remand the case for further proceedings in that court.

VAUGHAN AND WIFE *vs.* BIBB, GUARDIAN.

[SETTLEMENT OF GUARDIANSHIP ACCOUNTS.]

1. *Receipt of married woman and husband; when binding.*—If a married woman and her husband join in a receipt to her guardian for a sum of money due her as the ward of such guardian, the receipt is binding on her, unless there is mistake or fraud.—Ordin. No. 38, 1867.
2. *Receipt for Confederate money not void.*—Though the consideration of such a receipt may have been land or Confederate money, it would not be void for this reason. And the ward would be bound for the amount at which she and her husband re-sold the land thus obtained, though she only received Confederate money in payment, when there was no dissatisfaction manifested by her and her husband with the sale thus made.
3. *Probate court, power of, to re-state accounts during same term.*—The court of probate may recall and re-state an account of a guardian, once allowed and passed, during the same term at which it was so passed. The court's power over such a proceeding does not end until the court is adjourned without day for the term.
4. *Exception, when not noticed.*—An exception which is not unintelligible on account of the blanks in it, will not be noticed on a general assignment of errors.
5. *Same, when not sustained.*—Exceptions not supported by facts set out in the record will not be sustained.
6. *Interest, guardian's general liability for.*—Generally, a guardian is only liable to account for simple interest. He can not be charged compound interest unless he receives compound interest, or has been guilty of a gross abuse of his trust.

APPEAL from Probate Court of Montgomery.
Heard before Hon. DAVID CAMPBELL.

The facts appear in the opinion.

Vaughan and Wife v. Bibb.

WATTS & TROY, for appellants.

STONE, CLOPTON & CLANTON, *contra*.

(No briefs came into the Reporter's hands.)

PETERS, J.—This is an appeal from the decree of the court of probate of Montgomery county upon a guardian's final settlement. There is also an agreement of counsel filed with the transcript of the record, that the same transcript "may be considered as an appeal from the final settlement of W. C. Bibb's administration of the estate of Priscilla Ann Bibb, and that the two cases may be considered together on this record." There is no record in the case of the administration suit filed, and no appeal taken, and so far as I have been able to ascertain, no final decree rendered in that suit, and there is but one assignment of errors made. Under such a state of the record, the administration suit can not be treated as a proceeding properly in this court, and no notice will be taken of that cause. The mode of bringing a cause to this court is too well known to allow such an irregularity to take its place.—Rev. Code, § 3485, *et seq.*

Without further notice of the administration, I will, then, proceed to dispose of the appeal on the guardian's settlement.—24 Ala. 375.

The guardian's account was stated and filed for allowance in the usual form, and a day was fixed by the court for the hearing of the same. Upon the hearing, the ward and her husband objected to the allowance of one item of credit of ten thousand dollars. This item was supported by the receipt of the ward and her husband for that amount, which was paid December 5th, 1860. On this objection, the record of the settlement of the guardian as the administrator of the estate of Priscilla A. Bibb, deceased, was introduced, but it was in no wise connected with this item of the guardian's account. It was also shown that after the marriage of the ward, who was the daughter of the guardian, with Vaughan, the guardian had sold to said ward and her husband a tract of land for nine

thousand five hundred dollars, and paid them in money five hundred dollars beside; that the value of the land and the sum thus paid amounted to ten thousand dollars. And the amount thus made up was received by Vaughan and wife (the ward) as so much of her estate in the hands of said guardian. It was shown that Vaughan and his wife became dissatisfied with the land thus sold to them, and sold the same back to said guardian for eight thousand dollars, which was paid in treasury notes of the Confederate States. There was some evidence that the guardian had said on the first sale of land as above said, that he owed his ward about ten thousand dollars, but this was contradicted, there being but a single witness on each side as to this fact. There was no proof that there was ever any dissatisfaction expressed with the second sale of the land, as above shown, by Vaughan and wife to her guardian, or that they suffered any loss on the Confederate money that was paid to them, at that time. There was also considerable evidence as to the value of the land above said when it was first sold by the guardian to the ward and her husband; some of the witnesses stating that it was worth three dollars per acre, others stating it was worth five, and the guardian himself testifying that it had not been sold above its true value.

Upon this testimony the court below allowed the objection to the extent of two thousand dollars, and decided that the guardian was entitled to a credit of eight thousand dollars, "the amount of the Confederate treasury notes," which the guardian had paid to the ward and her husband in the fall of 1862, when the land was re-conveyed, and interest thereon. To this allowance the ward and her husband excepted, and now base an assignment of error in this court on this exception.

The bill of exceptions also shows that the court permitted the guardian to strike out of his account "the sum, to-wit, of \$——, with which he had charged himself, and to insert in lieu thereof the sum of \$——;" which was also excepted to by the ward and her husband.

The bill of exceptions likewise shows that the guardian

was permitted by the court to "re-state his account as the same was passed and allowed by the court." To this the ward and her husband also objected and excepted. But no reason is shown for the exception.

The ward and her husband also excepted to "the allowance of each alteration in said account as originally filed, save only the rejection of the said item of ten thousand dollars."

The ward and her husband likewise asked the court to charge the guardian with "the difference between compound and simple interest on the several sums" which said guardian had received from the estate of Edward Sims, who was the grandfather of the ward, and from whom the estate of her mother had been received, and which was the estate from which her own was derived. But this the court refused, and the ward and her husband excepted.

Upon the hearing of the guardian's account in the court below, the ward was found indebted to him in the sum of \$3,573.33, and he was discharged. The ward and her husband appeal to this court from said decree of discharge, and assign the same for error, and base other errors upon the exceptions above stated.

It does not appear that the ward was a minor when the receipt for the ten thousand dollars was executed. But whether this was so or not, it seems that the receipt of the husband alone would be sufficient. And this would bar her, equally with himself, if there was no fraud or mistake in its procurement.—Rev. Code, § 2375. The receipt given by the ward and her husband is in the following words: "Received, Montgomery, Ala., December 5th, A. D. 1860, of William C. Bibb, administrator of the estate of Priscilla A. Bibb, deceased, and as guardian of my wife, Cornelia D. Bibb, ten thousand dollars in full payment to date as administrator and guardian aforesaid, including the proceeds of the lease of land in Noxubee county, Mississippi, up to the 1st of January, A. D. 1863." Signed, "Vernon Henry Vaughan," "Cornelia D. Vaughan." No doubt that parties who are competent to act for themselves may settle their affairs without going into court and invok-

ing its aid, if they choose to do so. And such settlements, if free from mistakes and fraud, are final and binding as if done in court.—*Carter v. Owens*, 41 Ala. 217; Rev. Code, §§ 2685–86; *Motley v. Motley et al.*, 45 Ala. 555. The fact that the receipt thus given measured the value of the thing received in what is called “Confederate treasury notes,” does not render it invalid. There is no pretense that there was any fraud in the transaction, or that the parties did not know perfectly well what they were about. Adams’ Eq. 183, note C. It has been settled by the highest court of the nation, that a sale of lands for Confederate money is not void, but that the party bound is liable for the value of the consideration, however spurious it may have been as a currency.—*Thorington v. Smith*, 8 Wal. 1; see *Anderson v. McGowan*, 45 Ala. 462. On the re-sale of the land to the guardian, the husband and the wife, who was the ward, fixed the value of the consideration for which they had given the receipt. If they are now permitted to set this at naught, there would be no finality in such transactions. This does not seem to have been the purpose of the statute governing such instruments.—*Motley v. Motley et al.*, *supra*. Then there was no error in the action of the court below upon the matter of the receipt, and the decision upon the objection based upon it.

The third exception is not well taken. There was no error in merely permitting the re-statement of the account, if it was done during the term. Such matters are under the control of the court until the term of the court is closed by adjournment.

The third exception is based upon no facts that serve to make it intelligible. And the same may be said of the fourth and the fifth exceptions. They are too indefinite to raise any clear question of error in the court below.

The sixth exception can not be sustained. A guardian is not liable to account for more than simple interest, unless he receives more. Here it does not appear that he did, or that he has been guilty of any gross abuse of his trust.—Rev. Code, §§ 1827, 1828, 1829; 17 Ala. 306; 23 Ala. 385.

Bates v. Aldermen, &c., of Mobile.

The very general terms in which the assignments of error have been made in this case, has compelled me to deal rather with the questions made in the bill of exceptions than with the assignments.—21 Ala. 504; 20 Ala. 477; Rev. Code, p. 816, Rule I Pr. in Sup. Court.

There is no error in the judgment and proceedings in the court below. Its decree is therefore affirmed.

BATES vs. MAYOR, ALDERMEN, &c., OF MOBILE.

[FINE FOR FAILURE TO OBTAIN CITY LICENSE TO DO BUSINESS.]

1. *City license tax of Mobile, who liable to pay.*—A party who carries on business in the lower bay of Mobile, some thirty miles below the city, and outside of the corporate limits of the city, but whose residence is in the city, and who keeps the capital employed in his business there, is not liable to pay a city license tax.

APPEAL from the Circuit Court of Mobile.

Tried before Hon. JOHN ELLIOTT.

APPELLANT was tried before the mayor of the city of Mobile for carrying on business without license, and was fined twenty-five dollars. On appeal to the circuit court, the judgment of the mayor was affirmed, and hence this appeal.

The case was tried in the circuit court upon an agreed statement of facts, as follows: "The appellant is a stevedore, and was engaged in the business of storing cotton in the lower bay, about thirty miles from the city of Mobile, and outside of the corporate limits thereof, and had no office or place of business within the corporate limits of said city. Appellant resides in the city of Mobile, and keeps there the capital employed in his said business. Appellant's business is principally confined to the winter and

spring months, during the movement of the cotton crop. Occasionally, when in the city, appellant makes contracts with masters of vessels to load their ships lying in the lower bay as aforesaid, outside of the corporate limits of said city. The performance of said contracts, and all the work and labor necessary and incident thereto, is carried on outside of the corporate limits of said city, and all the tools and implements of appellant's said trade are kept and used where said trade is conducted, to-wit: outside of the corporate limits of said city." There was also an agreement of the parties as to the judgment, which need not be further noticed.

BOYLES & OVERALL, for appellants.—The license is required for persons carrying on a business, pursuit, trade or profession *in* the city. It is the business prosecuted and conducted within the city that is taxed; a business, in order to carry on which, the streets are used, the protection of police and corporate authorities are required, and which has the advantage of an aggregate population.

A license is not required for the privilege of a bodily existence in the corporate limits, or because a resident keeps his money or capital in a bank or at home within said limits, or because he occasionally meets a person and makes a contract to do something elsewhere. It is for following an avocation, by the pursuit of which he supports himself and family, or in which he is engaged as a business pursuit, trade or profession.

Section 388, Code of Ordinances, shows by its whole context that it never was intended to include the stevedores. It contemplates that the license shall have a business "local habitation and a name" within its corporate limits.

It speaks of the *place* of business of the license, the changing of the place of business and the name, and the taking in of a partner.

The agreed state of facts show that this class of persons have no place of business in, or do they perform and carry on their trade within, the corporate limits.

It seems clear that they (stevedores) are not included in

the letter or the spirit of the ordinances on this subject, or the charter.—City Charter, § 56.

RAPHAEL SEMMES, *contra*.—[Appellee's brief did not come into Reporter's hands.]

PECK, C. J.—The authority of the city of Mobile to assess a license tax is contained in section 56 of the city charter. By that section it is enacted, "that the authorities of the city of Mobile shall have authority to assess and collect from all persons and corporations, trading or carrying on any business, trade or profession, by agent or otherwise, within the limits of the city, a license tax," &c.

The city ordinance on this subject conforms, substantially, to the charter, and declares, "all persons trading or carrying on any business, pursuit, trade or profession in the city, shall obtain a license for the same, in the manner hereinafter prescribed," &c.

To subject a party to this license tax, his business, trade or profession must be carried on "*within the limits of the city*." These are the words of the charter.

It makes no matter where such party in fact resides, whether within or without the city limits. It is the place where his business is carried on that determines his liability to this tax. If that is within the limits of the city, his liability is fixed.

If a party has his residence in the country, yet if his business, &c., is carried on within the city, whether by himself or his agent, he must pay this license tax. This, it seems to us, is very clear, and we think it equally clear, that the converse of this is true; therefore, if he lives in the city, and carries on his business some where else, *outside of the city limits*, he is under no obligation to obtain a license for that purpose from the city authorities.

The facts agreed state, that the appellant's business was storing cotton in the lower bay, about thirty miles from the city, and outside of the corporate limits; and that he had no office or place of business within the city. This being

true, he was certainly not liable to pay a city license tax. The fact that his residence was in the city, and that the capital employed in his business was kept there, does not alter the case.

Let the judgment of the circuit court be reversed, and the cause remanded to that court, that the agreement of the parties may be carried into effect. The appellee will pay the costs.

KENNEDY ET AL. vs. MARRAST ET AL.

[BILL IN EQUITY TO SET ASIDE CONVEYANCE ON GROUND OF MENTAL INCAPACITY, INADEQUACY OF CONSIDERATION, AND FRAUD.]

1. *Deed by one of non-sane mind void.*—A deed made by a party of *non-sane* mind, to such a degree as to incapacitate him for making contracts, is void, and his heirs may file a bill in chancery to set it aside.
2. *Decree of chancellor, when will not be reversed; preponderance of evidence.*—When the decree of the chancellor is not opposed to the evidence on which it is based, it will not be reversed because the evidence which supports it is weak and suspicious. Before such a decree is disturbed, there must be a strong preponderance of the evidence against it.

APPEAL from Chancery Court of Mobile.

Heard before Hon. A. C. FELDER.

THE appellees, minors, filed in May, 1867, by next friend, a bill in equity against appellant, John P. Kennedy, seeking to set aside the conveyance to said Kennedy of a house and lot in Mobile, made by their father, J. C. Marrast, deceased, on the 30th November, 1863. One Strange, who was in possession of the property at the date of the filing of the bill, under a lease from Kennedy, and Harriet E. Marrast, widow of J. C. Marrast and his administratrix, in her individual capacity and as administratrix of said Marrast, were made parties defendant, the bill alleging, as to her, that she claimed dower in said house and lot, &c.

The bill alleges that "at the time of making said sale and deed, Marrast was in his last sickness, was a paralytic and did not possess a sane mind; that at that time his mind was so destroyed that he had not capacity to contract; that his condition was such that any person proposing to deal with him was bound to take notice of the fact, or be put upon enquiry as to the state of his intellect," &c. The bill also alleged fraud and inadequacy of consideration, and prays that the deed, &c., be declared void; that the title to said property be divested out of respondents and invested in complainants; that respondents be decreed to account for the rents and profits, &c., and offers to pay respondent Kennedy the value of the Confederate money paid by him, with interest.

Appellant answered, denying the allegations of mental incapacity, fraud, inadequacy of consideration, pleads that he is a *bona fide* purchaser for a full and valuable consideration, and demurred to the bill for want of equity.

The defendant Strange, in his answer, admitted indebtedness to Kennedy for rent of the premises, and offered to pay the same to those legally entitled to receive it. A decree *pro confesso* was taken as to Harriet Marrast.

The record is quite voluminous, and the details of facts connected with the sanity and mental capacity of Marrast are quite lengthy and minute; but in the view taken of the case by the court it is only necessary, for a proper understanding of the opinion, to make a brief abstract of the testimony of the parties.

By the appellees, it was proved that their father, John C. Marrast, died on December 14th, 1863, of paralysis, from which he had been suffering for many months; that on the 30th of November, 1863, said Marrast and wife executed a deed for the house and lot to Kennedy, in consideration of the payment of \$17,000 Confederate money, which then was worth in market seventeen dollars in Confederate notes for one dollar in gold.

There was proof tending to show the utter physical and mental incapacity of Marrast several months prior, and continuously up to his death; that he was not capable of

contracting, and in such a state of mind that his wife feared fatal results to him if she refused to sign the deed and thereby break off the sale. There was evidence tending to show that the house and lot in 1863 was worth \$12,000 in United States currency, and that the price paid for it was grossly inadequate, &c.

On behalf of appellant, there was much testimony on the part of several practicing physicians and others, tending to show, that the mind of Marrast gave no evidence of insanity or unsoundness up to the very hour of his death. It was proved that all the negotiations for the sale, &c., were made with one Evans, as agent of Marrast; that Evans had been offering the house and lot for sale for several months, and that Marrast and wife signed the deed, and no dissatisfaction with the sale by any one was ever expressed to Kennedy until the filing of the bill. Kennedy testifies, that he knew nothing whatever of the unsoundness of Marrast's mind, and there is no proof that he did. Appellant also offered much testimony going to show that the price paid for the house and lot was, for the times and condition of the country, a high price, &c.

On the hearing, the chancellor decreed that the deed to Kennedy be rescinded and annulled; that the title to said property be divested out of respondent and invested in complainants; that respondent account for the rents and profits from the date of the purchase, and that respondent be reimbursed the value in lawful money of the Confederate money at the time it was paid, with interest, &c. A reference was ordered to the register to take and state an account, &c., and upon the coming in of the report, the chancellor confirmed the same.

Kennedy appeals and now assigns as error the decree of the chancellor on the hearing.

DARGAN & TAYLOR, for appellant, commented at length upon the evidence, contending that it did not sustain the decree, and presented the following argument on the law of the case:

1. The court will bear in mind that this was a completely

Kennedy et al. v. Marrast et al.

executed contract. Kennedy received the house, and Marrast the purchase-money; and, also, that the contract is voidable only, and not void.—See 2 Kent Com., 7th ed., p. 562; 12 Barb. 237, and cases cited. Consequently, when it is sought to be set aside, the court requires the complainants to put the defendant in *statu quo*, and in all cases to do equity where the defendant is an innocent party.—Wharton & Steele, M. J., p. 15. Now, we insist that Mr. Marrast, if living, could not rescind the sale and recover the house without accounting for the use of the money. Suppose he invested it in cotton, and made large profits by the sale; bought other valuable property, or used it in the taking up of old gold debts, dollar for dollar, or in any other profitable manner, could he keep to himself all those profits or benefits arising from the use of our money, and then rescind the sale and take the house to boot? If he could not, his children, who occupy his shoes, can not. The court is ready to make them *whole*, but will not aid them to *speculate*; nor will the court take the risk of being imposed upon, by their refusing to account for the use made of the money. The complainants demand the house, and all the rents and profits made by us since it has been in our hands. Now, we ask the same of them as to the purchase-money. They have failed utterly. Their simple reply to this plea is, Never mind what we did with the money, or how much we have made; this is none of your business; we will pay you upon the then value of the money—that is, one dollar for sixteen in gold, and no more. This is no answer or defense to our plea.

2. The rule in equity is, that the court will not set aside the sale, unless the defendant can be placed in *statu quo*. In this case, the defendant can not be placed where he was. The money, and the government that made it, were dead before they made the offer to rescind. All the uses and purposes to which it could have been put, are gone, with the extraordinary times which gave it existence, never to return. The complainants, or their father, took to themselves the money, and assumed all the chances of in-

vestment and speculation, and of which we have been deprived forever, and put upon us all the risks of the war. Defendant's intention to invest and not risk the money, is manifest by his act in this purchase. Had he not made this, would have made others, which he could have done anywhere in this city at the same or better rates; or he could have done otherwise; all of which he has been deprived of. To say you will value his then money for him, with gold as the standard, is not meeting the equitable rule; his right to exercise his own judgment was taken from him, until all chances are gone; besides, why take *gold* as the standard? There is clearly no equity in this. We prove that gold was not used as money, but was bought and sold like other articles. Gold was higher than any other article. Take corn, bacon, cotton, and real estate, and we could have bought them at two or three for one; and yet *gold* is forced on us at *sixteen* for one. Why is this? We did not want *gold* at that price; besides, you take Confederate money and reduce it to gold, and give it to them *then*, and return us the same amount *now*, when it was then worth two or three times more than it now is. With one dollar then, we could have bought two or three times as much as now. Even at the North, about the same time, it was worth as high as \$2.80 in greenbacks, for one. The fact is, we can never be placed in *statu quo*. "True and generous equity" can not now be done.—1 Story Eq. § 228; 1 Pars. on Cont. 312; Wharton & Stelle, p. 15, § 11; *ib.* p. 7, note B; 2 Paige, 158; 7 S. & M. 103.

3. Mr. Marrast first placed the house in the possession of Mr. Evans, some two or three months before the sale was made. It will hardly be contended that he was incompetent when he gave this power of sale. No notice of subsequent insanity was ever given to the agent or purchaser. The authority was never revoked, but was consummated into a legal title. It is said by good authority, that "where authority is given by a *sane* man, who subsequently becomes *insane*, and without knowledge a sale is made to an innocent purchaser, it shall stand good."—2 Kent Com. 645, side page; 1 Pars. on Cont. 61, note E;

Story on Agency, p. 501, note 3 ; 1 Bell Com. 4th ed., p. 395, § 413 ; 10 N. H. 156. Whether the power to Evans was in writing or not, can not affect the case, for if the insanity revokes the power at all, it would do so whether it were in writing or in parol. The rule is based on a principle of equity, not the statute of frauds, and grows out of the following well settled equity doctrine, that "when one of two innocent persons must suffer, equity will put it upon him whose acts and conduct furnished the opportunity and induced the result." Mr. Marrast having in this case, when he was rational and sober, armed Mr. Evans with authority to seek and find a purchaser, and make the contract of sale, if Mr. Evans' action, under his power, has caused injury, who must suffer—the innocent purchaser, or he whose action induced the evil? If Mr. Marrast set the deadfall, can his representatives complain if it fell on himself?—See Story on Sales, 161, § 202 ; 25 Barb. 484, top page ; 37 Barb. 509 ; 37 N. Y. Rep. 509 ; Smith's Merch. Law, 288–9.

It is also a well settled principle in equity, that "where the equities are equal, the law must prevail." In this case, both plaintiff and defendant claim under J. C. Marrast. Mr. Kennedy, a purchaser for value, and complainants, by descent only ; otherwise, they may be said to be equally innocent and equally diligent.—See Story's Eq., vol. 1, § 57.

The following cases show the rule to be, that the court will not grant relief against an innocent person, especially where he can not be placed in *statu quo*. In many cases *statu quo* is not mentioned, where the purchaser is innocent, and objects. And in all cases where the subject is *destroyed*, it is held the parties could not be put in *statu quo*. There is no such thing as *valuing the loss* and making him whole with money. The parties must be placed back exactly as they were, or not at all. Can the Confederate money paid be now returned as it was, with all the opportunities to use it that *then* existed?—9 Vez. 478, 482 ; 9 Wills, H. & G. 309 ; 24 Eng. L. & Eq. 486 ; 26 *ib.* 540 ; 7 *ib.* 284 ; 1 McCarter, (N. J.) 389 ; 13 Iredell, 106 ; 32 Vt. 652 ; 28 Conn. 127 ; 18 Ill. 282 ; 8 Rich. E. 286.

Taking these things altogether, the decision of the chancellor should be reversed, and the case dismissed.

HERNDON & SMITH, *contra*.

PETERS, J.—The deed under which the appellant, Kennedy, seeks to support his title, was made by Marrast himself, and not by his agent. And Kennedy must be charged with notice, just as if he dealt directly with Marrast himself. If Marrast was of *non-sane* mind to such a degree as to incapacitate him from making such a contract when the deed was signed by him, and he did not afterward affirm it when he was of sound mind, it was void. A legal capacity to consent is the essence of all contracts, whether by deed or parol. Without this they are absolutely void. 1 Story Eq. §§ 222, 223, 227, 228, 229, 230; 1 Pars. Cont. 383, *et seq.*; 5 Bac. Abr. (Bouv.) 5, 26; 2 Poth. Obl. by Evans, note III, p. 22, *et seq.*; *Rawdon v. Rawdon*, 28 Ala. 565. A bill to set aside such a deed may be filed by the heirs of the maker.—Newland Cont. p. 19, note C.

The capacity of John C. Marrast, deceased, the ancestor of the complainants in the court below, is the question put in issue by the pleading. This is a fact, and not a question of law. This fact was submitted upon the proofs taken in the cause to the decision of the chancellor. His decision was favorable to the complainants and against the capacity of Marrast to make the deed. In such a case the decision of the chancellor will not be disturbed, unless there is a decided preponderance of the evidence against the conclusion attained by him.—*Phillips, adm'r, v. Phillips*, 39 Ala. 63. I think the testimony in this case sufficiently sustains the decree. It will therefore be left to stand.

The decree of the chancellor is therefore affirmed, and said John P. Kennedy, appellant, will pay the costs of this appeal in this court and in the court below.

[NOTE BY REPORTER.—At a subsequent day of the term,

appellant applied for a re-hearing, and filed in support thereof the following argument :]

The rule of law is well settled, and has been stated with clearness by Peck, C. J., in the case of *Cotton v. Ulmer*, as follows: "Reason is the common gift of God to man; hence *every man* is presumed to be sane, and insanity can only be proved by clear and *unexceptional evidence*."

Partial insanity will, however, invalidate a will or a contract, but it must be fully and clearly established that the act was the result of such partial insanity; for to hold that testimony of a doubtful or suspicious character, even as to partial insanity, would defeat a solemn act, would in truth and in legal effect be to annul the proposition that insanity, to invalidate a deed or will, must be clearly established.

The question, therefore, is not whether the testimony in this case renders it doubtful whether Marrast was *compos mentis* at the time of executing this deed; but it is, whether the evidence clearly establishes his mental incapacity. And we insist that this is a rule of law that is binding on the court. The burthen is on the complainants to overcome the *deed*. It is assailed on the ground of mental incapacity *alone*, for neither fraud or undue influence is pretended; and before it can be annulled, "the proof must be *clear and unexceptionable*;" that is, the mind of the court must be satisfied of incapacity, for we must be guided by the rule laid down in *Cotton v. Ulmer*, which only announces a rule that has been recognized for ages.

It may be true, as stated in the opinion delivered, that in cases of doubt this court will not reverse the decision of the chancellor on a mere question of fact; yet we ought to look at the case in 39 Ala. 63, *Phillips v. Phillips*.

In that case, the bill was filed to impeach a deed. The testimony rendered the question of capacity doubtful. The bill was dismissed, and the decree was affirmed in this court, in harmony with the general principle just adverted to, and announced by the Chief Justice in *Cotton v. Ulmer*. And if the court, in 39 Ala. 63, had put the decision on

this ground, its reasoning would have been as cogent as its judgment or decree was correct. But to say that if a chancellor, upon doubtful testimony, sets aside a deed for want of mental capacity, this court will not reverse, is to say that if the chancellor disregards a cardinal rule of law, this court will not examine it, because he committed the error in looking to the evidence, or the weight of evidence. To such a proposition this court will not commit itself.

It may be added, that the language in 39 Ala., used by the court, is apt to mislead, and in the case at bar may have misled this court; for the well-considered rule is laid down in the celebrated case of *Kennedy v. Kennedy*, 2 Ala., in which Collier, C. J., says: "We will not undertake to say that the appellate court will not reverse a decree on the ground that an issue was not directed to be tried by a jury, when it appears that the facts are so disputed as to render it impossible to explicate them, even although no issue was prayed in the court below. In such a case, a *viva voce* examination before a jury seems indispensable."

Now, if there ever was a case where an issue should be directed, it is this; for no human mind can read all the depositions and say, "I have no doubt but Marrast was mentally incapable of making a contract of this character." He must say, indeed all must say, that *at the least* the question of his mental capacity is doubtful.

The whole proof thus answered, the rule seems to apply the deed must prevail, and the bill be dismissed.

If, however, the mental capacity be so involved in doubt that the court should be unwilling to dismiss the bill, then the issue should be directed, as stated in 2 Ala.

The following response to the petition was made by—

PETERS, J.—The evidence in this case was carefully examined in the preparation of the opinion in the first instance. I have again examined it in connection with the authorities furnished by the eminent counsel in support of the application for a re-hearing, and I do not feel that the testimony did not justify the decree of the learned chan-

Brame v. McGee et al.

cellor in the court below. It is true that in the court below the presumption is in favor of the sanity of the maker of a deed. But when the case comes here, the presumption is the other way. It is in favor of the correctness of the chancellor's decree, the verdict of the jury, or the decision of the judge below upon the facts, unless there is a strong preponderance of the evidence against the judgment below.—*Phillips v. Phillips, adm'r*, 39 Ala. 63.

The re-hearing is therefore denied, with costs.

BRAME vs. MCGEE ET AL.

[BILL IN EQUITY TO SUBJECT CONTRACT SEPARATE ESTATE OF MARRIED WOMAN TO PAYMENT OF A NOTE GIVEN BY HER WITHOUT CONSENT OF HER HUSBAND, DURING COVERTURE, FOR PAYMENT OF HER OWN DEBT.]

1. *Separate estate of married woman; what will be subjected in equity to payment of note executed by her during coverture.*—Where a *feme sole*, in contemplation of marriage, by an ante-nuptial deed conveys her property to a trustee, in trust to her sole and separate use, for the support and maintenance of her intended husband and herself, and such children as they may have, chancery will charge it with the payment of a promissory note, made by her after the marriage, for her own debt.
2. *Same; bill filed to subject; what need not state.*—A bill, filed for that purpose, need not state that the debt was contracted for "family supplies or maintenance."

APPEAL from Chancery Court of Greene.

Heard before Hon. A. W. DILLARD.

In 1860 one of the appellees, Mrs. McGee, then a Miss Mason, in contemplation of marriage with James McGee, joined with him in a deed by which they conveyed her estate, real and personal, to appellee, Foster M. Kirksey, to hold the same in trust for the sole and separate use of Mrs. McGee after the marriage, which, as the bill of complaint states, took place on the day after said deed was made,

without being subject, in any manner, to the debts of her intended husband, and that said trustee should permit her and her husband to keep and retain in their possession, during their joint lives, the slaves belonging to the wife, and take the issues, profits and labor of said slaves for the support, maintenance and use of themselves and any children they might have, and also to occupy and cultivate the lands thereby conveyed; but said property was not to be sold or disposed of, without the joint consent of Mr. and Mrs. McGee and said trustee; and, if Mrs. McGee survived her husband, she was then to hold said property, and the rights and interests therein, discharged from the said trusts, but if Mrs. McGee died first, then said property to be disposed of as she might direct by her last will and testament, and if she failed to make a will, then to go to her heirs-at-law.

In 1867, Mrs. McGee made a promissory note, commonly called a due bill, to the complainant for fifty-seven dollars, and the same being unpaid, complainant, in 1869, filed his bill to have said promissory note paid out of said separate estate. The bill states, that at the time the same was filed, the separate estate of Mrs. McGee consisted of a house and lot in the town of Eutaw, the residence of said husband and wife, several hundred acres of land, and between four and five thousand dollars in the hands of said trustee, and prays that said note and the costs of said suit might be decreed to be paid out of the trust funds in the hands of said trustee, &c., and for general relief.

Mr. and Mrs. McGee and said trustee are made parties defendant. Decrees *pro confesso* were taken against all the defendants, which were afterwards set aside, and said parties filed answers and demurrers. The answer of the trustee was required to be on oath, but was without oath, and assigns several grounds of demurrer. The husband and wife filed an answer and several grounds of demurrer to the bill. The second only need be noticed, and that is based on the ground that the bill does not state that the said note was given for the support and maintainance of the family, &c.

All the several causes of demurrer were overruled, except the one above named, which was sustained, and the chancellor required the complainant to amend his bill "so as to charge that the note was for family supplies or maintenance." The answer of the trustee admits the fifth paragraph of the bill, which states that he had between four and five thousand dollars, in money, in his hands belonging to said trust estate. The answer of husband and wife states that the said note was given without the husband's knowledge.

The complainant not being able to amend his bill, as required by the chancellor, it was dismissed for want of equity.

R. CRAWFORD, for appellant.—1. The deed does not vest in Mrs. McGee a separate estate, under the Code of Alabama—1st. Because the husband is trustee for the wife, and does not enjoy the profits of the estate.—Rev. Code, § 2372. 2d. The property can not be conveyed by them jointly, by instrument of writing attested by two witnesses.—Rev. Code, § 2373. 3d. The proceeds of the sale of any property can not be used by the husband, even in such manner as is most beneficial for the wife.—Rev. Code, 2374. 4th. The husband has no power to receive the property coming to the wife, but the trustee, Kirksey, alone.—Rev. Code, § 2375. 5th. In case Mrs. McGee should die intestate, the property goes to her heirs-at-law, which would be in the course prescribed in Part 2, Title IV, Chapter 1, page 416, Revised Code; whereas, if it were her separate estate under the Code, McGee, the husband, is entitled to one-half of the personalty of such separate estate absolutely, and to the use of the realty during his life.—Rev. Code, § 2379; see, also, *Cowles and Wife v. Morgan*, 34 Ala. 535.

2. As a general rule, a person can not hold a valuable beneficial interest in property which can not be subjected, either at law or in equity, to the payment of his debts.—*Rugely & Harrison v. Robinson*, 10 Ala. 731. The intervention of a trustee does not protect the property, since equity considers the *cestui que trust* as the real owner, and the

trustee as a mere man of straw.—*Lamb v. Wrigg & Stewart*, 8 Porter, 82.

3. There is nothing in the expression, "for her support and maintenance," which can prevent a court of equity from selling the property. Such effect has been allowed to the words, where the property was given to the wife, without other words of exclusion of the husband's rights; and not in cases where the attempt was to subject the wife's interest.—*Rugely & Harrison v. Robinson*, *supra*; *Spear v. Walkley*, 10 Ala. 328; *Jasper v. Howard*, 12 Ala. 652. The case of *Hill v. McRae*, (27 Ala. 181,) is very unlike the case at bar. There the trustee was to retain the possession of the property, and apply a portion of the profits to the reasonable support of the beneficiaries; here, the property itself is given.

4. Trust property is liable to be disposed of by operation of law *in invitum*, like any other property, although indirectly the purposes of the trust may thereby be defeated. 2 Story's Eq. Jur. § 974, citing a case in point; *Greene v. Spear*, 1 Russell & Mylne, 395; *Graves v. Dolphin*, 1 Simons, 66. See particularly *Robertson & Fettibone v. Johnston*, (36 Ala. 107,) re-affirming *Rugely & Harrison v. Robinson*, (10 Ala. 902,) and principle further illustrated in case in point in 17th Ala. 617—*McCroan, Trustee, v. Pope et al.* See, also, *Young v. Kinebrew*; *Sprague v. Tyson*, January term, 1870.

5. A *feme covert* having a separate estate under deed, giving her note, intends thereby to charge her separate personal estate.—40 Ala. 572; *Gunter v. Williams and Wife*, 20 Ala. 332; *Ozley v. Ikelheimer*, 20 Ala. 229; *Blevins v. Buck*, 13 B. Monroe, 381. In 19 Ala. 146, it is ruled, that the intention of the parties to the instrument must govern. Consider herein—1st. All the property was Mrs. McGee's; 2d. She could dispose of it by will; 3d. In case she made no will, it was to go to her heirs; 4th. It could not be sold or disposed of unless she joined, and it could not be subjected to his engagements, &c.; 5th. In the event of McGee's death, the trust was at an end.

The requisition that the three together only could sell or

dispose of the property, is not inconsistent with the idea that it was her separate estate.

Again—Any keeping, retaining, or possessing by McGee must be construed to mean for the use of the wife.

Again—In the construction of deeds, if there are two clauses which are inconsistent and irreconcilable with each other, the last must give way to the first.—19 Ala. R. 634 ; 2 Story's Eq. Jur. 1394.

6. The words, "for the sole and separate use and maintenance of her and her children," do not manifest an intention to limit the quantity of her interest, but merely to show the motive of the settlement.—*McCroan v. Pope et al.* 17 Ala. 612.

JOHN G. PIERCE, and WM. P. WEBB, *contra*.

PÉCK, C. J.—1. I think it very clear, that the separate estate of Mrs. McGee in this property is not a statutory separate estate. The husband has none of the rights and privileges to which a husband is entitled, when the wife has what is called a separate estate under the Revised Code, or the statutes on this subject in existence at the time said Code was made.—*Cowles et ux. v. Morgan*, 34 Ala. 535. Her separate estate is created by the said ante-nuptial deed, and her rights and liabilities depend upon, and must be determined by it ; in other words, it is a common law separate estate, and consequently may be charged with the payment of her debts in a court of equity.

2. If a *feme covert*, having a separate estate by an ante-nuptial settlement, after her marriage, enters into a bond, jointly with her husband, for the payment of her own debt, chancery will subject such separate estate to its payment, although nothing is said in the bond, directly, making the debt a charge upon the separate estate.—*Forrest et ux. v. Robinson, ex'r*, 4 Porter, 44, decided in 1836. The principle of that case has uniformly been recognized as the rule of decision in this court, from that time to the present. *Bradford et ux. v. Greenway, Henry and Smith*, 17 Ala. 797 ; *Collins v. Rudolph*, 19 Ala. 616 ; *Collins v. Lavenburgh & Co.*,

ib. 682; *Cowles et ux. v. Morgan*, 34 Ala. 535; *Gunter v. Williams et ux.* 40 Ala. 561.

In the case of *Forrest et ux. v. Robinson, ex'r, supra*, as in this, the property embraced in the ante-nuptial settlement was the property of the wife before the marriage. In such a case, it would be inequitable to permit her to settle her property to her separate use, for the support and maintenance of her intended husband and herself, and such children as they might have, in such manner as to withdraw and exempt it from the payment of her own debts, unless contracted for the support of the family. The chancellor, therefore, was mistaken in supposing it was necessary to be stated in the bill that the note was given for "family supplies or maintenance." And in the case made by the bill and answers, the note should have been decreed to be paid by the trustee, out of moneys in his hands belonging to the said trust estate.

Let the decree be reversed, at the costs of the appellees, to be paid by the trustee out of the moneys in his hands belonging to said trust estate, and the cause remanded for further proceedings in conformity with this opinion.

BROWN ET AL. vs. THE STATE.

[INDICTMENT FOR DISTURBING RELIGIOUS WORSHIP.]

1. *Religious worship, disturbance of; what necessary to constitute offense of under section 3612 of Revised Code.*—To constitute an offense under section 3612 of the Revised Code, for disturbing religious worship, there must be not only an actual interruption or disturbance of an assemblage of people met for religious worship, by noise, profane discourse, rude or indecent behavior, or by some other act or acts of like character, at or near the place of worship; but such interruption or disturbance must also be *willfully* made by the person or persons accused. The intent of the parties is of the very essence of the offense, and to

Brown et al. v. The State.

be *willful* it must be something more than mischievous—it must be in its character vicious and immoral.

2. *General good character ; must refer to time before commission of offense.*
In such a case, evidence of general good character must have reference to a time before, and not after the act or acts complained of were committed ; and when the defendant has voluntarily put his character in issue by introducing evidence of his general good character, the State, even on cross-examination, can not inquire into the defendant's character subsequent to the time the offense charged was committed.
3. *Section 3612 of Revised Code ; meaning of word "interrupt," as used in ; what improper definition of.*—A charge given by the court, of its own motion, that "the word 'interrupt,' as used in the statute under which the defendants are indicted, means anything done by the defendants, or any other persons, which takes the attention of the hearers away from the services, or discourse of the minister," is erroneous. The meaning of the word 'interrupt,' as here given, is too general and inapplicable, and the tendency of the charge was to mislead the jury.
4. *Charge to jury ; what erroneous.*—A charge that instructs the jury that "although the evidence might fail to show that all the defendants engaged in a conversation in the church yard, so near as to create an interruption or disturbance of a portion of the assemblage of people in the house, yet if they stood by, thus encouraging others, by their presence, to talk, that such would be as guilty as though they had engaged in the conversation themselves," is an improper charge, and calculated to mislead the jury, as it does not require it to be shown that there existed any combination, or common purpose, to make an interruption or disturbance.
5. *Section 3612 of Revised Code ; what proper charge on indictment under.*
A charge that instructs the jury that "they must believe from the evidence, beyond all reasonable doubt, that there was a *willful* interruption or disturbance of a congregation of people met together for religious worship ; and that they must also believe from the evidence, beyond all reasonable doubt, that such disturbance was caused by noise, profane discourse, rude or indecent behavior, or some other improper act, at or near the place of worship, intentionally performed by the defendants, before they can find them guilty ; and if the jury believe that such act or acts were performed heedlessly or recklessly, that is, carelessly, or without thinking of the probable consequences of such act or acts, then the jury should return a verdict of not guilty"—states the law correctly, and to refuse to give it, when asked in writing, is an error for which the judgment will be reversed.

APPEAL from Circuit Court of Henry.

Tried before Hon. J. McCaleb Wiley.

The appellants, Burrell Brown, William Ashley, William Weems and Wesley McKissock, who were jointly indicted

under section 3612 of the Revised Code for disturbing religious worship, went to trial on plea of not guilty, were found guilty, and fined.

From the bill of exceptions taken on the trial, it appeared that when a portion of the congregation had assembled for public worship at Sale Chapel, in Henry County, but before service commenced, the appellants came by on horseback, at a gallop, some fifty yards from church, and just then appellant Weems, who had been riding behind, and was just catching up, called out to the others: "You have been ahead of me all night, but damned if I am not up with you now." When they went through the church yard they checked the pace of their horses. Afterwards they came into the church, and one of the defendants laid down on a "rickety bench," which made a noise every time he moved, but this attracted no particular attention. Shortly after this all the defendants walked out, asking a witness named Cole to go with them, and Cole had some conversation in a low tone, near the church, with defendants, and soon afterwards appellants came in and took seats as before, remaining until the congregation was dismissed.

While the appellants were outside the church some loud talking was heard, which disturbed some of the congregation, and which ceased when they returned. No witness recognized any of the parties talking outside except the appellant Brown, although there were five or six in the crowd; and while they were outside some one threw a bottle against a tree, or something making a like noise, and this frightened a lady witness, who, as she testified, thought a pistol had fired. The appellants had a bottle, and some of them had been drinking. Rev. Mr. Holderberry, the minister holding service, testified that the conduct of defendants on the aforesaid Saturday and Sunday nights was so disorderly that he called in his appointments at that place, and ceased to preach there for a while.

This was in substance all the evidence tending to show the guilt of appellants; and on the part of the defense several witnesses were introduced, who testified that they

were not disturbed ; that the talking outside was very low, and did not disturb the meeting, &c.

The defense then introduced successively two witnesses, who testified that they knew the character of defendants, &c.; that their character was good, and that they were peaceable young men, and witness had never heard of their being charged with disturbing religious worship before the present indictment was found.

On cross-examination, the solicitor for the State asked these witnesses if they had not heard that defendants disturbed the congregation at Sale Chapel the next day after the alleged disturbance for which they were indicted. The defendants objected to the question, upon the ground that evidence of character should be confined to the time of the commission of the act for which they were indicted, and anterior thereto. The court overruled the objection and allowed the witnesses to answer, and the defendants excepted.

One witness then stated, in substance, that he was at Sale Chapel the next day (Sunday) after the commission of the alleged offense for which defendants were indicted, and heard a cow bell at the time referred to, and had heard that defendants had caught a cow by the tail up the road, and disturbed the congregation thereby, but it did not disturb him. The other witness stated the same thing in substance.

The defendants introduced a witness, who testified that the cow which was caught by the tail was two hundred and fifty yards from the church ; that the cow jumped out of the road, and Ashley's hold was jerked loose at once. When the cow jumped off, the bell made some noise. Two of the defendants, Brown and Weems, were not present when the cow was caught by the tail.

This was substantially all the evidence. And thereupon the court, of its own motion, charged the jury that "the word 'interrupt,' as used in the statute under which the defendants are indicted, means anything done by the defendants, or any other person, which takes the attention of the hearers from the services, or discourse of the min-

ister." The defendants excepted to the giving of this charge.

The court also charged the jury that "although the evidence might fail to show that all the defendants engaged in the conversation in the church yard, so near as to create an interruption or disturbance of a portion of the assemblage of people in the house, yet if they stood by, thus encouraging others to talk, that such would be as guilty as though they had engaged in the conversation themselves."

The defendants excepted to this charge.

The defendants asked the following written charges :

1. "That the jury must believe from the evidence, beyond all reasonable doubt, that there was a willful interruption and disturbance of a congregation met together for religious worship ; and that they must also believe from the evidence, beyond all reasonable doubt, that such disturbance was caused by noise, profane discourse, rude or indecent behavior, or some other improper act, at or near the place of worship, intentionally performed by the defendants, before they can find them guilty ; and if the jury believe that such act or acts were performed heedlessly or recklessly, that is, carelessly, or without thinking of the probable consequences of such act or acts, then the jury should return a verdict of not guilty."

2. "That if the evidence shows that there was no talking near the church door and in the church yard near the church, until the defendants Brown, Ashley, Weems and the witness Cole went out, and that there was no talking of a disturbing character after they came in, and that while they were out, a bottle was thrown against a tree some eighty yards off, and broken, creating a loud noise, these are circumstances against defendants ; but if this circumstantial evidence is inconclusive, or if they can account for the existence of such circumstances on any reasonable hypothesis consistent with the innocence of defendants, they must do so ; and before they can find all the defendants guilty of disturbing the assembly, they must believe, beyond all reasonable doubt, that each one of them participated in doing the act which created

the disturbance; and before they can find any of the defendants guilty, they must believe from the evidence, to a moral certainty, that such defendant intentionally did the act or created the noise which disturbed the congregation, knowing at the time that such noise or acts were calculated to disturb; but if done carelessly or thoughtlessly, and not pursuant to design, they must find the defendants not guilty."

3. "That the word 'interrupt' means stopped, hindered from proceeding, and as used in section 3612 of the Revised Code, under which the defendants are indicted, it means a stopping or hindering the progress of such worshipping assembly in effecting the objects and purposes for which such congregation has assembled; and that an interruption which merely breaks the chain of thought, or which merely attracts the attention momentarily of a portion of such assembly, is not an interruption of such worshipping assembly within the meaning of said section of the Code."

The court refused to give any of the charges asked by the defendants, and they severally excepted, and now bring the case here by appeal, and assign as error that the court below erred—

1st. In allowing defendant's witnesses to be cross-examined as to hearsay of particular acts of appellants subsequent to the commission of the offense for which they were indicted, in order to rebut proof of good character.

2d. In the charges given the jury.

3d. In refusing to give the charges asked by appellants.

W. C. OATES, for appellants.—1. It was competent for the appellants to prove on the trial their general good characters up to the time of the alleged commission of the offense.—*Felix v. The State*, 18 Ala.; *Rosenbaum v. The State*, 33 Ala.

The circuit court erred in allowing the State to prove by hearsay that appellants disturbed the congregation at the same church the next day. The State is permitted to rebut the evidence of good character, even by particular acts

of bad character, committed before the alleged commission of the offense, but not after.—3 Greenl. Ev. § 25, 1; *Felix v. The State*, 18 Ala. But there is no authority for proving by hearsay a subsequent rumor of an act derogatory to their good character.—Roscoe Cr. Ev. 97; 2 Russell, by Greaves, 786; 2 Phil. E. 490, 8th ed.

2. The charge of the court to the jury defining the meaning of the word 'interrupt,' as used in the statute under which the defendants were indicted, was latitudinous, and most clearly erroneous. The word 'interrupts' is not a word of technical meaning, hence it is to receive a construction according to its usual and popular sense. In that sense the legislature used it in section 3612 of the Code. It means "*hindered, stopped from proceeding.*"—See Webster's Unabridged Dictionary, title INT. "*Interrupt—To stop or hinder by breaking in upon; to prevent from proceeding; to disturb.*"—Worcester's Dictionary.

3. The second charge given to the jury by the court, *mero motu*, invaded the province of the jury, by assuming as a fact that all the defendants were present and encouraging, by their presence, others in talking in the church yard, to the disturbance of a portion of the worshipping assembly.—*Frank v. The State*, 27 Ala. 37; 17 Ala. 587.

4. Each and every one of the written charges which the appellants requested the court below to give to the jury, asserted correct legal propositions, and should have been given. To constitute the offense for which appellants were indicted, there must have existed in the mind of each one of them a specific intention to disturb the assemblage, provided we construe the statute by the necessity of its enactment and the history of its origin. It was unknown as an offense at common law. It is of statutory origin. It was enacted by the parliament for the protection of the dissenters, and was adopted by our own legislature, and in fact by nearly every State in the Union, to carry into effect the declaration of the constitutional right to worship God, each man according to the dictates of his own conscience. In its origin it was intended to guard worshipping assemblies from assaults and intentional interruptions by reli-

gious fanatics who were intolerant towards those differing from them in religious notions and practices. I am aware that by the former decisions of this court, the statute under consideration has received a somewhat broader construction than I am contending for. My construction is, that although the inference of an intent to disturb is raised by law, when the act done or noise created is of such a nature or character as that a disturbance is the natural consequence thereof, yet the presumption or inference thus raised is traversable, disputable, and not conclusive; and that unless the jury can say, upon a survey of the whole of the evidence, that such intent existed in the minds of the defendants when the act was performed which created the interruption or disturbance, they can not in any case find them guilty.

But in this case it is unnecessary to indulge in speculations. Tried by the adjudged cases, the charges which the court below refused to give are correct legal propositions, and puts that court manifestly in error by refusing the instructions as prayed by appellants.—*Harrison v. The State*, 37 Ala. 154.

ATTORNEY-GENERAL, *contra*.—1. The court did not err after the accused had put their "characters in issue," in permitting testimony showing their bad conduct as disturbers of public worship, to be introduced.—*Harrison v. The State*, 37 Ala. 154. In such cases, *particular instances* of improper conduct may be proven.—*Commonwealth v. Moon*, 2 Dana 402; *Sacket v. May*, 3 Dana, 80. And evidence of bad conduct or character subsequent to the commission of the offense may be given.—*Commonwealth v. Sacket*, 22 Pick. 394; *Rosc. Cr. Ev.* p. 91, and notes.

2. Any noise *intentionally* made, which disturbed the worship of the congregation, was a violation of the law, and on proof of this fact the accused could be rightfully convicted.—*Kurney v. The State*, 38 Ala. 224.

3. The charges asked by the defendants were properly refused. If the act was done by any one of the party engaged in a common enterprise, all were guilty.—1 Bish.

Cr. Law, § 264; *Rey v. Sackett*; *The People v. Mather*, 4 Wend. 229, 255-56.

If the charges asked by defendants contained in each an incorrect proposition, although the remainder of the charge was correct, the court did not err in refusing to give it, or them.

PECK, C. J.—By section 3612 of the Revised Code it is provided that “any person who *willfully* interrupts or disturbs any assemblage of people met for religious worship, by noise, profane discourse, rude or indecent behavior, or any other act, at or near the place of worship, must on conviction be fined not less than twenty, nor more than two hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year.”

To constitute an offense under this section, there must be not only an actual interruption or disturbance of an assemblage of people met for religious worship, by noise, profane discourse, rude or indecent behavior, or by some other act or acts of like character, at or near the place of worship, but such interruption or disturbance must be *willfully* made by the person or persons accused. The intent of the party or parties is of the very essence of the offense, and to be willful, it must be something more than mischievous—it must be in its character vicious and immoral. The evidence in this case is all set out in the bill of exceptions, and I have examined it carefully; it is very indefinite and uncertain, and it seems to me barely sufficient to have put the accused on their defense.

This offense, if clearly proved, should be severely punished, but in doubtful cases, I am persuaded the cause of religion and the public good will be better subserved and promoted by suffering it to pass without the notoriety and excitements of a criminal prosecution. The best interests of religion are seldom, if ever promoted, by being too careful to mark what is done amiss.

We have discovered several errors in the record for which we think the judgment should be reversed. 1. After

the State had closed the evidence for the prosecution, the bill of exceptions states that "the defendants then introduced and examined one John Morris, who had been sworn by the State, but not examined, who testified, in substance, that he was acquainted with defendants, and knew their general character; that their characters were good; that they were peaceable young men. He was then asked if he had ever heard them charged with disturbing worship *before this charge*. He answered he had not.

"The solicitor for the State then asked, on cross-examination, if he had not heard that they disturbed the congregation at Sale Chapel church the next day after the alleged disturbance for which they were indicted. The defendants objected to this question, upon the ground that evidence of character should be confined to the time of the commission of the act for which they were indicted, and anterior thereto." The court overruled the objection, and allowed the witness to answer, and the defendants excepted. The witness then stated that he was at said church next day, on Sunday, after the alleged disturbance on Saturday night before, and that he heard the cow bell, but that it did not disturb him; that he heard that defendants had caught a cow by the tail up the road, and disturbed the congregation thereby.

This question was not a proper question to be asked, even on cross-examination, because it referred to a time different from that embraced in the defendant's question, and because it referred to a particular act, and not to the general character of the defendants.

It is not permissible, in a criminal prosecution, for the State to inquire into the general character of a defendant, until he has voluntarily put it in issue, and then the inquiry must be confined to a time antecedent to the time when the offense charged is alleged to have been committed.

I am aware it has been held otherwise in Massachusetts, in the case of *The Commonwealth v. Sackett*, 22 Pick. Rep. 394. This, if not an isolated case, is not sustained by the current of authorities, either text writers or reported cases

Wharton's Am. Cr. Law, 4th rev. ed., 636-38 ; Greenl. Ev. § 54 ; Bish. Cr. Pro. § 488-89, and the cases cited by these authors.

The State, against the defendants' objection, was permitted to ask a like question of several other witnesses examined by the defendants to prove their general good character, and defendants excepted.

2. After the evidence was closed, the court, of its own motion, charged the jury that "the word 'interrupt,' as used in the statute under which the defendants are indicted, means anything done by the defendants, or any other persons, which takes the attention of the hearers from the services, or the discourse of the minister." This charge is clearly erroneous. Its tendency was to mislead the jury, by withdrawing their attention from the essence of the offense, the intention of the defendants, and that the interruption or disturbance of the assemblage was wilful on their part.

The second charge given by the court is objectionable, for the reason that it makes the defendants that did not participate in the conversation alleged to have disturbed the assemblage, as guilty as though they had engaged in the conversation themselves. This could not be, unless the proof showed a combination or common purpose on the part of the defendants to do the unlawful act.

The first written charge asked by the defendants should have been given. It states the law correctly in regard to the character of the doubt that will entitle a defendant to an acquittal.—Bish. Cr. Pro. § 818-19. In the case of *Jane v. The Commonwealth*, 2 Met. (Ky.) Rep., Chief Justice Simpson says: "The evidence must be sufficient to produce a full conviction of guilt, to the exclusion of all reasonable doubt."

The second and third written charges asked by the defendants were properly denied. The third is by no means clear and perspicuous, but involved and complicated, and would no doubt have embarrassed and misled the jury. As courts are required to give written charges in the very

terms in which they are written, (Rev. Code, § 2756,) and are not permitted in any manner to explain or alter them, therefore, unless they are altogether right, they may be refused without error.

The third gives an incorrect meaning and application of the word 'interrupt,' as used in section 3612 of the Revised Code, and was rightly overruled for that reason. The offense may be committed, without necessarily stopping or hindering *the progress* of a worshipping assembly *in effecting the objects and purposes* for which such assembly has met together.

For the errors mentioned and pointed out in this opinion, the judgment of the court below is reversed, and the cause is remanded for another trial.

NELSON vs. THE STATE.

[INDICTMENT FOR ASSAULT WITH INTENT TO MURDER.]

Fine; when can only be fixed by jury.—1. A party who is prosecuted for an assault with intent to murder, by indictment, in the circuit court, and who confesses himself guilty of an assault and battery with a pistol must have "the amount of the fine" "fixed and determined by a jury." The fine can not be fixed by the court in such a case.—Revised Code, §§ 3670, 3672, 3757, 4170.

2. *Costs; what judgment may be rendered on failure to pay.*—And if such party pays the fine during the term of the court at which he is so found guilty, but fails to pay the costs or to confess judgment for the same with good and sufficient securities as required by the Code, he may be sentenced to hard labor for the county in which the trial is had, for a period of time in proportion to the amount of the fine, or for a period necessary to pay the costs, at forty cents a day.—Revised Code, §§ 3759, 3760, 4061.

3. *Quere.*—Can such a person so convicted be imprisoned to enforce the payment of the costs thus imposed, if he fails to pay them or secure them, as allowed by the statute?—Const. Ala. 1867, art. 1, § 22.

APPEAL from Circuit Court of Dallas.

Tried before Hon. JAMES Q. SMITH.

The facts are stated in the opinion.

REID & MAY, for appellant.—1. The sentence of the 9th June was without authority of law. 1st. Because the sentence of the court (31st May,) had been complied with; 2d. The defendant could not be held in custody for failure to pay the costs, and 3d, the 9th June sentence is too uncertain. The State's constitution, art. 1, § 22, says: "There shall be no imprisonment for debt except in case of fraud." The supreme court of Indiana uses this language—"The costs in a criminal case are matters of private right, and constitute a mere indebtedness, for which, in the absence of fraud, a defendant can not be ordered to be imprisoned."—*Thompson's case*, 16th Ind. R. 517; *Shafer's case*, 18th Ind. R. 444. The judgment or sentence of the 9th June is *void for uncertainty*. From it can the clerk, the sheriff or the defendant *determine the term* he is to do hard labor? There is too much room for injustice.

2. The controlling tests, whether costs in criminal cases are debt or penalty, are shown by the several sections of the Revised Code, §§ 3763, 4220, 4221, 4336, 4340. Section 3760 is controlled by *amount* of the *fine*, and by the fact that the Governor can remit a *fine* but can not *costs*.—*Chisholm's case*, 42 Ala. 527; *Farley's case*, 8 Blackford R. 230.

ATTORNEY-GENERAL, *contra*.

PETERS, J.—This is a criminal prosecution by indictment upon a charge of assault with intent to murder, commenced in the circuit court of Dallas county. The trial took place on the 31st day of May, 1871, when the defendant being arraigned pleaded guilty of an assault and battery with a pistol. And the judgment recites—"It is therefore considered by the court that the defendant be fined the sum of twenty-five dollars." It does not appear that there was any jury impaneled in the case to "fix and

determine the amount of the fine," but that the same was fixed by the court, without the intervention of a jury. This fine was paid by the defendant during the term of the court, but no judgment for the costs was confessed by the defendant, with securities, as required by the Revised Code. And there was no judgment rendered against the defendant in the court below for costs, except as hereinafter shown. On the 9th day of June, after the defendant pleaded guilty, as above shown, and was fined twenty-five dollars, the following entry of judgment was made, to-wit: "This day came S. W. John, solicitor for Dallas county, who prosecutes this case on behalf of the State, and came also the defendant in his own proper person; and the defendant failing to pay the costs imposed upon him at a former day of this term, or to confess judgment for the same, it is ordered by the court that defendant be sentenced to hard labor for the county of Dallas until the said costs are paid at the rate of forty cents per day. And the clerk of this court is ordered to ascertain the amount of costs, estimate the number of days the prisoner is to be held, and furnish the same to the sheriff." And at a subsequent day of the term of said court, to-wit, on the 13th day of June, 1871, the said defendant moved the court "to be discharged from further custody, under the sentence in said behalf of date 31st May, 1871," on the ground that said sentence was unauthorized, and contrary to law; and that the costs imposed on him, said defendant, was a civil demand or debt. This motion the court refused and the defendant excepted. From the judgment thus rendered the said defendant appeals to this court.

The judgment in this case was without warrant of law. In prosecutions by indictment, the jury alone can "fix and determine the amount of the fine," except "when an offense may be punished, in addition to a fine, by imprisonment or hard labor for the county."—Revised Code, §§ 3757, 3758, and 4170. Here the charge was for an offense punishable by imprisonment in the penitentiary, without fine; and the conviction was for an offense punishable by fine, "not more than two thousand dollars, or imprisonment in the county

jail, or sentence to hard labor for the county, not more than twelve months.”—Revised Code, §§ 3670, 3672 and 4199. From this, it is evident that the imprisonment was not in addition to the fine, but in lieu of it, and the punishment could not be fixed by the court, but only by a jury.—Rev. Code, § 4170. Then, the fixing of the fine by the court, without the intervention of a jury, was erroneous. In such a case as this, a jury should determine the fine.—Revised Code, § 3757. Beside this, the judgment should have been rendered for a definite amount, or for “the costs of the prosecution.” And the imprisonment should have been fixed in proportion to the amount of the fine, (Rev. Code, § 3760,) or in proportion to the amount of the costs, at forty cents per day.—Rev. Code, § 4061.

But beyond this, the appellant contends that he could not be held in custody for the costs alone, after the fine was paid. This depends upon the construction to be given to the present constitution of the State, and the law in reference to the collection of the costs in criminal prosecutions in the circuit court. The Revised Code directs that “where a fine is assessed, the court may allow the defendant to confess judgment, with good and sufficient sureties for the fine and costs.”—Revised Code, § 3759. But “if the fine and costs are not paid, or a judgment confessed according to the provisions of the preceding section, the defendant must either be imprisoned in the county jail, or, at the discretion of the court, sentenced to hard labor for the county.”—Revised Code, § 3760. Here, the fine was paid, but the costs were not paid; and no judgment was confessed and security given for the same, as required by law. And the defendant was condemned “to hard labor for the county of Dallas until the said costs are paid, at the rate of forty cents per day.” This judgment is not equivalent to a sentence of imprisonment until the costs are paid. It does not, then, violate that section of the constitution of the State, which declares, “that no person shall be imprisoned for debt.”—Const. Ala. 1867, Art. I, § 2; Pamphlet Acts 1870–71, p. 5. How the payment of the costs shall be enforced in criminal cases is for the general assembly to de-

termine, and for the courts to carry into effect. I am of the opinion that a party can not be imprisoned to enforce the payment of costs in such a case. For the reason that costs are not strictly a part of the punishment, but only a debt, the collection of which may be enforced by execution as any other debt.—Rev. Code, § 3761. But, if the costs are not paid, or secured as allowed by law, I know of no restraint on the legislature which forbids the State to impose a certain amount of work for the county on the defendant, as the mode of securing the payment of the costs in a criminal case. The public good—which is the “*salus populi*,”—demands the prosecution of persons charged with offenses forbidden by law. And such prosecutions can not be carried on without incurring a liability for costs. Where there is no constitutional restriction, this liability may be enforced in such manner as the legislative authority may think fit. For, without restriction, the legislative authority is supreme.—*Dorman v. The State*, 34 Ala. 216, 229, *et seq.*; Rev. Code, § 4061. A party, then, under such a conviction as this, for a public offense, may be sentenced by the court to hard labor for the county during the time prescribed by law, unless he secure the payment of the fines and costs, as required by the statute. That is, “if the fine does not exceed twenty dollars, ten days; if it exceeds fifty, and does not exceed one hundred dollars, thirty days; if it exceeds one hundred, and does not exceed one hundred and fifty dollars, fifty days; if it exceeds one hundred and fifty, and does not exceed two hundred dollars, seventy days; if it exceeds two hundred, and does not exceed three hundred dollars, ninety days; and for every additional one hundred dollars, or fractional part thereof, twenty-five days.”—Rev. Code, § 3760. When both the fine and costs are not paid by a party found guilty on an indictment for a public offense, punishable by fine or imprisonment in the county jail or to hard labor for the county, the foregoing section of the Revised Code prescribes the limits of the period during which he may be sentenced to hard labor for the county, if the sentence is under this section. And he is not entitled to be discharged until he serves out the

period thus designated or secures the fine and costs, or the costs where the fine is paid, as required by the Code.—Rev. Code, §§ 3749, 4061. The court, then, did not err in refusing the motion of the defendant in the court below, without payment of the costs as well as the fine, or without confessing judgment for costs with good and sufficient securities, as allowed by law.

Doubtless the legislature may make the payment of costs a part of the punishment, and in case of a failure to pay or secure them, then to imprison as an alternative, as in case of a fine. But until this is done the courts must be content with power to enforce the law as it now stands, provided the imprisonment is not cruel.—Constitution Ala. 71, § 17.

For the error first above pointed out, the judgment of the court below is reversed and the cause remanded for a new trial; but the said Aaron Nelson, the defendant in the court below, will be kept in custody until discharged by due course of law.

GARDNER, ADM'R, vs. PICKETT, ADM'R.

[BILL IN EQUITY FOR INJUNCTION.]

1. *Bill in chancery; what without equity.*—The executors of an estate were indebted to an attorney for services rendered during their administration, and he was indebted to them for money of the estate loaned to him, the payment of which was secured by a mortgage. On final settlement they charged the estate in their favor with the value of his services, but failed to execute an agreement with him to credit his debt with the amount allowed to them,—*Held*, that a bill in chancery by him to enjoin a sale of the mortgaged property by the administrator of a distributee to whom his debt and mortgage had been transferred in the distribution of the estate, and to credit his debt with the amount due him for his services, was without equity.
2. *Same; what amendment is a departure.*—An amendment to such a bill,

Gardner, Adm'r, v. Pickett, Adm'r.

setting up a claim of another person to the mortgaged property as a prior incumbrancer, is an inadmissible departure from the original bill.

APPEAL from Chancery Court of Pike.

Heard before Hon. ADAM C. FELDER.

The facts are set forth in the opinion.

J. L. PUGH, for appellant.—This is not a bill to establish a set-off, or collect a debt with which the estate of Siler is charged by the contract of the executors for lawyer's fees, and hence the cases cited by appellee's counsel do not apply.

On the contrary, it is a bill to perpetually enjoin the sale of real estate under a mortgage to secure a note which has already been paid and extinguished by the executors of Siler, while they were executors and authorized to receive payment of the note in services rendered by the maker of it. After the services were recognized as a proper charge against the estate, and allowed as a credit to the executors, they agreed to satisfy the note and credit each with the other.

The division made of the assets, money and property by commissioners in December, 1862, does not show that McIntyre's note was among the notes turned over. The bill states that McIntyre's note was turned over on *final* division, and that at the *final settlement*, Parks, the secretary, had the note, and that after the allowance on the final settlement of the \$1,632, Parks, having possession of the note, placed a credit on it of the *identical six hundred and thirty-two dollars* allowed for the services rendered *on the final settlement*. Certainly, then, the note had not passed from under the control of the executors when the agreement was made to extinguish it with the allowance for McIntyre's professional services.

If the executors employed McIntyre, and reported the amount they had charged the estate with for his fees, and the amount was allowed them, *indisputably* they could accept payment of that allowance in McIntyre's note, which the bill distinctly shows they agreed to do at the time the

credit was allowed on final settlement. This arrangement by the *quasi* trustees of the legatee extinguished McIntyre's note as an asset belonging to the estate and subject to distribution. Then, how can the complainant be required to go on the executors, and the legatee be permitted to collect a note that has once been paid and satisfied by the lawful, just, and equitable contract of her trustees? The legatee does not stand in the position of a creditor or purchaser. The legacy she has was properly chargeable with the debts and just claims and allowances against the estate. She was entitled to nothing until all these were discharged. The note she has, the executors have *appropriated* and *withdrawn* from the assets of the estate, with the consent and approbation of the probate court. What right has the legatee to the note in equity and conscience?

The case of *Coopwood et al. v. Wallace et al.*, 12 Ala. 790, has been restored as an authority to support the right of executors to charge the estate in the lawyers' fees, by the case of *Mulhall v. Williams and Wife*, 32 Ala. 489.

"It is a self-evident truth," says Justice Dargan in *Coopwood v. Wallace*, "that an administrator has the right to employ lawyers to aid him in the collection of the debts and property belonging to the estate, and to charge the estate with just compensation for such services."

This being the undoubted law, the executors had a clear right to collect McIntyre's note in services, instead of money, and having been once collected by the trustees of the legatee, she can not collect it again out of McIntyre, and turn him over to her trustees for redress.

As to the amended bill making a new case, and joining complainants: Soles made a sale of the real estate mortgaged, before the mortgage was executed. The purchase-money had never been paid him by McIntyre. After McIntyre's note was satisfied by the agreement with the executors, Soles re-purchased the real estate, and credited the amount paid for the lot on the re-sale with the \$300 purchase-money due him. Soles' lien for the \$300 was older than the mortgage, (the mortgage was made to secure an antecedent debt,) and in equity Soles has the older

Gardner, Adm'r, v. Pickett, Adm'r.

and better lien. Besides, McIntyre's estate would be responsible to Soles, if this mortgage is foreclosed by a sale of the lot, as in the absence of covenants of warranty *the law* would bind McIntyre's estate to remove the incumbrance. This associates Soles' and McIntyre's administrators and heirs in interest in the bill now filed, to perpetually enjoin the enforcement of a lifeless incumbrance. 4 Ala. 21; Story Eq. Pl. §§ 224, 229. They are *proper*, if not necessary parties.

STONE, CLOPTON & CLANTON, *contra*.—1. The bill is without equity.—*Jones v. Dawson*, 19 Ala. 672-78; *Kirkman, Abernathy & Hanna v. Benham*, 28 Ala. 501.

2. The bill is fatally deficient as a bill for equitable set-off.—*T., C. & D. Railroad v. Rhodes*, 8 Ala. 206; *Carroll v. Malone*, 28 Ala. 621.

3. The amendment makes a new case.—*Winter v. Quarles*, 43 Ala. 692.

B. F. SAFFOLD, J.—The case made by the bill is, that Edward L. McIntyre was the attorney of the executors of Solomon Siler, deceased, in their administration and final settlement of his estate. He had borrowed money from them, and secured its payment by a mortgage on a house and lot. They were indebted to him for his services. On their final settlement they charged the estate with the amount of these services, and credited McIntyre's debt with a portion of the amount allowed them. They agreed with him that the entire allowance should be so credited, but in the distribution of the estate by commissioners his note and mortgage were transferred to one of the distributees, Mary A. Siler, afterwards Mrs. Pickett, and the credit was not made. The administrator of Mrs. Pickett, who was about to foreclose the mortgage, is made a party defendant, together with the surviving executors and the heirs-at-law of those who had died. The prayer is, that the credit allowed the executors be set aside, and that his debt be credited with the amount he may be entitled to receive, and for an account between him and the executors ;

and for an injunction to restrain the sale of the property mortgaged by him.

The bill was dismissed for want of equity, and misjoinder of parties, with leave to amend. The amended bill introduced Lemuel B. Soles as a party complainant with McIntyre, and propounded his interest, the substance of which was, that he had originally sold the mortgaged property to McIntyre, and had purchased it back again for something more than the purchase-money, which had never been paid, and was in possession. This bill was also dismissed for the same reasons as the other.

The claim of McIntyre was upon the executors, and not upon the estate of Siler. His debt was assets of the estate. When the executors charged the estate with the amount of his claim, it was a preclusion of any possible recourse upon it in favor of McIntyre, even if he had otherwise had such a right. The agreement between him and the executors was not executed by them, but they had, by their action, chosen to be accountable themselves to him. *Jones v. Dawson*, 19 Ala. 672-78.

The amended bill did not help McIntyre's case by setting up the claim of Soles as a prior incumbrancer. It made a new case, inadmissible as an amendment, besides being subject to the objections of misjoinder of parties and multifariousness.—*Winter v. Quarles*, 43 Ala. 692.

The decree is affirmed.

CABELL vs. THE STATE.

[INDICTMENT FOR ASSAULT WITH INTENT TO MURDER.]

1. Defendant, indicted for assault with intent, &c.; what must be proved as to words of encouragement, &c., to parties committing assault, &c.—On the trial of a party indicted for an assault with intent to murder, if it appears the assault was, in fact, made by a mob, and not by the de-

Cabbell v. The State.

fendant, and he is sought to be convicted by proving that he encouraged, aided and abetted the mob to commit the assault, by words uttered by him, it must be shown that they were addressed to, or at least heard by, the persons, or some of them, composing the mob.

2. *Same; when words not sufficient to make out offense.*—If the words were not addressed to, or heard by, the persons, or some of them, constituting the mob, then they are not of themselves evidence of any combination or common design between the defendant and the mob.
3. *Same; particular intent must be proved.*—On the trial under such an indictment, the State must prove the particular intent charged in the indictment.
4. *Same; accountability of defendant and effect of words of encouragement to mob; what not destroyed by.*—The legal effect of words of encouragement addressed to a mob, whatever it be, can not be destroyed by the after repentance of the speaker.

APPEAL from Circuit Court of Dallas.

Tried before Hon. M. J. SAFFOLD.

THE defendant and two other persons were jointly indicted for an assault with the intent to murder one Andrew J. Baxley. The indictment was in the form prescribed by the Revised Code.

On motion of the defendants, a severance was allowed by the court, and a separate trial granted to each defendant. Thereupon appellant was put upon his trial, on the plea of not guilty, was convicted, and sentenced to be confined in the penitentiary for two years.

The evidence for the State and the defense, as set out in the bill of exceptions, discloses, in substance, the following case, to-wit :

On the 5th day of November, 1870, the said Baxley shot and killed a negro man, in the city of Selma, named Alfred Granger, and was immediately arrested by the marshal, and was being carried to prison, when suddenly a mob of negroes collected around the marshal and violently took him out of his custody, and dragged him along the street about a square, and entered a house with him called the "Old Dominion," which was immediately filled with the mob.

The marshal states that he followed the mob into the house, and endeavored to prevent the injuries being in-

flicted upon the said Baxley ; that notwithstanding his efforts, said Baxley was badly beaten and injured by the crowd, and efforts were once or twice made to cut his throat ; that the room was densely packed with white and black, principally the latter ; that there were cries of " kill him," " he must die," &c.; that it was about an hour and a half before the crowd could be got out of the room, during all which time efforts were made to injure said Baxley ; that he did not see the defendant during the day, or hear him say anything.

The evidence for the State shows, that soon after the mob entered the house, the defendant, who was a drayman, drove up on his dray in the street in front of the house and asked, " what is all this fuss about?" A negro woman standing on a dray near by answered, " they are killing the man who killed Alf. Granger ;" that defendant said, " that is right, kill him, God damn him," and jumped off his dray to the side-walk in front of the Old Dominion, which was densely crowded with men around the door of the room, and the witness who testified to this saw him no more.

The evidence for the defense tends strongly to show that defendant was at the depot of the Selma, Rome & Dalton railroad when the mob first assembled, and remained there until a short time before the mob separated, and knew nothing of what was going on when he drove up, coming from the direction of said depot, on his dray, and asked what was the matter, and was told that Alf. Granger and another man was killed, and were in the house there, (pointing to the Old Dominion,) and upon being told by the witness it was too bad a place for him, he turned his dray up street and drove off.

After the evidence was closed, and the court had given its general charge, to which defendant excepted, the defendant asked the court to give the following written charges :

1. That an assault with the intent to murder differs from a riot in this—that on a charge for a riot, it is sufficient to prove a general intent to do an act, or aid and abet in doing the act ; but for an assault with intent to murder, it

is necessary for the State to prove the specific intent to do the thing charged in the indictment.

"2. That the *gravamen* of the offense charged is the "intent to murder A. J. Baxley," and that if the jury believe from the evidence that the defendant, at the time he made the remark, "kill him," &c., did not know who was being assaulted, and did not know A. J. Baxley, that then they must find the defendant not guilty.

"3. If the jury believe that the defendant made the remark or exclamation, "kill him," &c., not knowing actually what had been done, or what was being done to A. J. Baxley, and that upon going into the house and seeing Baxley inhumanly treated, repented and went away, then they must find defendant not guilty.

"4. That the jury must believe, beyond all reasonable doubt, that the words of the defendant, "kill him," &c., were addressed to, or heard by, some of those persons engaged in the common design, before these words can operate to his prejudice in this case.

"5. That if the jury believe that the words alleged to have been spoken by the defendant is all the evidence to connect him with the common design, then they must be satisfied, beyond a reasonable doubt, that these words were spoken to, or in the hearing of, some of those engaged in the common design, before they can find the defendant guilty as charged."

The court refused to give any of these charges, and defendant duly excepted, and now assigns the refusal to give the charges asked, as well as the general charge given by the court, as error.

SUMPTER LEE, for appellant.

ATTORNEY-GENERAL, *contra*.

•(No briefs came into the Reporter's hands.)

PECK, C. J.—In disposing of this case, we do not think it necessary to consider and determine the propriety of the general charge given to the jury and excepted to by

the defendant. On another trial, it will probably not be thought necessary to give this charge.

The first charge asked, I think, might have been given without error; nevertheless, its denial was not erroneous. Although the difference between an assault with intent to murder, and an act done by a riot, as to the character of the intent, may be admitted to be correct, it was not necessary to determine that question on this trial.

Under this indictment, it was necessary for the State to prove the particular intent charged.—*Ogletree v. The State*, 28 Ala. 693. If the defendant did not know who was being assaulted, and did not know A. J. Baxley, the words imputed to him, under the circumstances, did not prove the intent charged in the indictment; therefore, the second charge should have been given.

The third charge was correctly refused, whatever may have been the legal effect of the defendant's exclamation, "kill him," &c. If it had any legal force, it was not destroyed by after repentance.

It is not pretended that the defendant committed the assault,—it was the act of the mob; nor was it seriously contended that he was, in fact, a member of that unlawful assembly; consequently, the words uttered by him can not be held to have encouraged or aided the persons by whom the assault was committed, unless addressed to, or at least heard by them, or some of them. It was therefore error to refuse the fourth charge.

No argument is necessary to show the correctness of the fifth charge.

If the defendant did not himself commit the assault, and the only evidence to connect him with the common design, if any such design was proved, are the words alleged to have been uttered by him, it is very clear he should not be convicted, unless the words were spoken to, or in the hearing of, the persons engaged in the common design.

If these words are the only evidence of a common design on the part of the defendant, they certainly can prove

Wright et al. v. Stott, Adm'r.

no common design with persons by whom they were never heard.

For the errors in refusing to give the second, fourth and fifth charges asked, the judgment of the court below is reversed, and the cause is remanded for another trial, and the said defendant will remain in custody until discharged by due course of law.

WRIGHT ET AL. vs. STOTT, ADMINISTRATOR.

[ACTION ON PROMISSORY NOTE.]

1. *Administrator ; what contract of makes liable.*—Where a purchaser at an executor's sale of his testator's personal property made in 1860, by agreement with the executor in 1864, settled his debt with Confederate currency, which he immediately received back as administrator of a deceased distributee's estate in part payment of his intestate's share,—*Held*, the contract was supported by such partial payment, and the purchaser was liable, as administrator, to the estate he represented, and not as debtor to the estate from which he purchased.

APPEAL from Circuit Court of Butler.

Tried before Hon. P. O. HARPER.

At a sale of the personal property of the estate of James Craigg, made by his executors in 1860, the appellants purchased a mule and gave their promissory note therefor, payable to the executors on the 1st of March, 1861. In 1864 the appellant, Wright, paid the note with Confederate currency, which one of the executors agreed to receive, on the condition that Wright, who was the administrator of Wm. G. Craigg, one of the distributees of the testator, would receive it back in payment of so much of his intestate's interest. The condition was complied with and the note was given up. This executor, in his final settlement

in 1866, reported this note as still the property of the estate of his testator, received credit for it as uncollected assets and turned it over to his successor, Stott, who brought this suit for its collection. The court charged that it was a subsisting demand against the defendants in favor of the plaintiff.

GAMBLE & POWELL, for appellants.—The charge of the court, however, as given, withdraws from the jury the consideration of any fact tending to show that the party rightfully entitled to the proceeds of the note sued on had ratified the transaction, and hence tended to mislead the jury. "A charge is erroneous which withdraws from the jury any facts, however weak, which tend to establish the point in issue;" because such charges tend to mislead.—See *Edgar v. McArn*, 22 Ala. 796; *Pritchett v. Munroe*, 22 Ala. 501; *Reese v. Beck*, 24 Ala. 651; *Upson v. Raiford*, 29 Ala. 188. The point in issue in the case at bar is, the payment of the notes and the charge given, withdrew from the jury every fact of a ratification of the payment by the party rightfully entitled to the notes or the proceeds.

2. Now, if Wright, clothed with authority and being the only party legally entitled to receive this legacy, ratified the payment made by Wright and Rouse, the appellants in this case, and received the money in discharge of such legacy due to him as such representative, we insist that this was a good payment and extinguished the debt.—See *Chapman, Lyon & Hays v. Cowles*, 41 Ala. 103; *Dubberly v. Black's Adm'r*, 38 Ala. 193; *West, Olive & Co. v. Ball & Crommelin*, 12 Ala. 340. Hence the pertinency of the evidence of R. R. Wright and the other witness for the defendant, and the court therefore erred in giving the charge. Because it withdrew from the jury the consideration of these facts.—See *Edgar v. McArn*, *supra*, etc. A payment of a debt in Confederate money is not *ipso facto* a void payment.—See on this point *Cannon v. McNab*, January term, 1871; *Hale v. Houston, Sims & Co.*, January

term, 1870 ; *Herbert & Gessler, v. Easton*, 43 Ala. 547, June term, 1869. If, then, the payment in Confederate money is not *ipso facto* void, the charge given withdrew the consideration of any fact in this point from the jury, and was therefore erroneous as tending to mislead the jury.

HERBERT & BUELL, *contra*.—The charge complained of simply asserts that an administrator had no right to collect in Confederate treasury notes a note payable to the estate in "dollars," the note having been made before the war, without showing some valid reason why he did so.

The decisions of this court, to the effect that such currency was not money, are too many and too familiar to require quotation.

The only show of excuse shown to the court was that Henry, the executor of Craig, had at the same time paid the Confederate money he had taken from Wright, as an individual, back to Wright as *administrator of one of the distributees*.

If Henry had no right to take as executor, Wright had no authority to take as administrator. If Henry was guilty of a conversion, Wright had no power to ratify this conversion. To allow this, would be to permit these two representatives to entirely destroy the estates they represented—one of them ratifying the wrong of the other, for if Wright could ratify for Henry, Henry could ratify for Wright, and the estates would be at their mercy.

American Law Review for October 1869, p. 125, under head of State decisions, says: "Administrators, attorneys, and the like, never had the right to receive Confederate money in payment of debts due them in their representative capacity," citing *Succession of Lagarde*, 20 La. An. R. 148 ; *Davis v. Lee*, *ib.* 248 ; *Fry v. Dudley* *ib.* 368 ; *Wingfield v. Crosby*, 5 Cold. 241 ; to which could be added numerous decisions of this court.

But it is contended that it was error to withdraw from the consideration of the jury the fact that Wright, as ad-

ministrator of W. G. Craig, one of the distributees of the estate of James Craig, deceased?

The charge is not obnoxious to the criticism made by appellant. This was no application of the fund to the payment of *a debt of the estate*.

2. It was not even payment to the administrator of an estate not connected with the estate represented by Henry. The distributees of the estate of Wm. G. Craig were really interested in the estate Henry was controlling. Henry and Wright were both responsible to these distributees for their trusts, and the law would not permit them to combine to destroy the trust fund. What injury was it to withdraw this transaction from the consideration of the jury, when it could not possibly amount to any justification. It did not tend to prove any ratification by the *cestui qui trusts*, who alone had the power to ratify this illegal conversion. If that transaction was in the judgment of this court legal, then it follows that neither the distributees of James Craig nor of Wm. G. Craig can hold either administrator responsible, and that Wright, who represents one of these estates, has a right to account to the distributees, whom he represents, in worthless currency for property in which they were interested, and for which he agreed to pay in good money.

This is opposed by all the decisions of this court upon the subject.

B. F. SAFFOLD, J.—The charge can only be sustained on the assumption that Wright's acquisition of the note was in consideration only of his payment of the Confederate currency, and that this amounted to nothing at all. Such is not a proper application of the principles governing the use of Confederate currency as declared by this court. Under certain circumstances an executor or administrator is entitled to credit for assets of the estate he represents collected in this currency.—*Houston v. Deloach*, 43 Ala. 364. A party can not of his own volition repudiate an executed contract made with him, as the executor, Henry, attempted to do in his final settlement.—*Ponder v. Scott*, 44 Ala. 241.

It was not shown that the plaintiff had exhausted his remedy against the executor or that he was insolvent.

On the other hand, Wright made himself responsible to the estate he represented for the amount of the debt. He gave other consideration for the note than the Confederate currency. He acknowledged payment to him of part of the interest of his intestate. This was the real and sufficient consideration of the contract between him and the executor of James Craig. The note was mere evidence of a debt, which the parties, authorized to do so, settled. They became responsible to their respective beneficiaries for the settlement made.

The judgment is reversed and the cause remanded.

BOLES *vs.* THE STATE.

[INDICTMENT FOR ARSON.]

1. *Witness ; what question can not be compelled to answer.*—A female witness, for the prosecution in a criminal case, may be asked on cross-examination if she is unmarried, and she may be compelled to answer. But she can not be compelled to answer a question the response to which involves her in the confession of a crime.
2. *Same ; ill fame of witness, founded on what, not sufficient to impeach.*—A female witness in a criminal case may be asked on cross-examination, whether she is not a person of such "ill fame as to exclude her from society," but the court should not compel her to answer, unless it appears that the cause of her "ill fame" would be a proper reason to impeach her veracity as a witness. If her exclusion is founded on a prejudice against her religious creed, her mode of dress, her political sentiments or nativity and the like, it should not be allowed to discredit her.
3. *Arson, indictment for; ownership of property must be proved as laid.*—The forms of indictment found in the Code are prescribed by law. And on a charge of arson, where they allege an ownership of the house set fire to or burned, the ownership must be proved as charged in the indictment.

APPEAL from Circuit Court of Coffee.

Tried before Hon. J. McCaleb Wiley.

The facts appear in the opinion.

G. T. YELVERTON, for appellant.

ATTORNEY-GENERAL, *contra*.

PETERS, J.—The appellant, Boles, with one Yarbrough, was indicted in the circuit court of Coffee county for arson in the third degree, for setting fire to or burning a corn house of Dennis Howell. There were three counts to the indictment. The defendant below pleaded not guilty, was tried by a jury and convicted, and was fined five hundred dollars and sentenced to hard labor for the county of Coffee for six months. And having failed to confess judgment for the fine and costs with good and sufficient securities, he was also condemned “to hard labor for said county for one hundred and forty days more.” From this judgment the said Boles appeals to this court.

There was a bill of exceptions taken at the trial, from which it appears that there was some evidence offered by the prosecution on the trial below, which tended to show that the accused was guilty of setting fire to the corn crib of said Howell within the time alleged in the indictment. And for the purpose of impeaching a witness offered for the State, the defendant’s counsel asked her if she was an unmarried woman. She answered, yes! She was then asked if she was not the mother of a negro bastard child. The State objected. The court then informed the witness that she might answer or not, as she might choose, and witness refused to answer and the defendant excepted to the ruling of the court. The defendant then asked her if she was not of “such ill fame as to be excluded from society.” The State objected, and the court sustained the objection, and the defendant excepted. There were also some other exceptions by the defendant to the evidence introduced by the prosecution, which need not be noticed further. And beside these exceptions, there were several others to the

charges given and to the refusal to charge, as asked by the defendant in the court below.

It was certainly competent for the defendant to ask the witness, Eliza Williams, if she was an unmarried woman, and it was proper to compel an answer, because such an inquiry could not in any wise tend to criminate her. But the question intended to develop the fact that she was the mother of a negro bastard child was different. The state of facts to which an answer to this question pointed involved the confession of the crime of fornication or adultery.—Rev. Code, § 3598. In such a case the witness is not bound to answer, unless she chooses. And here the court very properly left it to her choice. In this there was no error.—*Campbell v. The State*, 23 Ala. 44, 82. But the question as to the “ill fame” of the witness stands upon a different footing. “Ill fame” is not necessarily criminal. Therefore, a witness may be compelled to testify as to her ill fame, provided the character of her ill fame is such as impeaches her veracity, but not if the ill fame is founded on a mere prejudice. If such ill fame arises from a want of veracity or chastity, then it may be shown; because these are defects that render a female witness less worthy of belief.—*The State v. Crowley*, 13 Ala. 172; *Rosc. Ev.* 181; *People v. Mather*, 4 Wend. 229. The witness must depose in open court and upon oath to speak the whole truth, except in privileged cases.—Const. Ala. 1867, art. 1, § 8; Rev. Code, § 2703; 1 *Phill. Ev.* pp. 14, 15, 16, and C. and H. Notes. And when a witness testifies in court he is not only bound to answer truthfully as to his knowledge of the facts put in issue by the pleadings, but he puts his own character in issue as an instrument of proof. And this allows an inquiry into his general character.—*Ward v. The State*, 28 Ala. 53, 64. Hitherto there has been less doubt as to the effect of a want of chastity on the part of a female witness than on the part of one of the other sex, but doubtless this has been occasioned rather from the fact that men make the law, and women are compelled to obey it, than any just distinction in principle for the difference. And were the question as to the

effect of a want of chastity on the veracity of a witness *res integra*, I would be disposed to hold that it was the same without regard to sex. But the rules of what is called society are too fickle, and sometimes too unjust to make an "exclusion from society," a test of truthfulness in a witness. Society has no rule of exclusion—in many cases some mere whim, growing out of a difference of religion, or politics, or dress, or nativity. Then, the ill fame that may exclude from society is not necessarily such as should be allowed to impeach the veracity of a witness. And as the question here did not show what character of ill fame was meant, or the extent and character of the exclusion, it was properly excluded by the court. The other objections to the testimony in support of Mrs. Williams are put with too much looseness for a clear comprehension of their meaning and purpose. When this is the case the court may overrule the objections.—Rev. Code, §§ 2755, 4302; Rule Sup. Court, No. 1; Rev. Code, p. 816.

The first charge asked by the defendant in the court below should have been given. It was in these words, to-wit: "That if the State failed to prove by evidence of title, ownership of the property fired as charged in the indictment, the jury can not find the defendant guilty." The form of the indictment requires this allegation. These are the forms prescribed by law. What they contain is required to be alleged. And what is required to be alleged must be proven.—Rev. Code, p. 811, No. 36, 37; *Ib.* § 4141; 1 Greenlf. Ev. § 51; Rose. p. 270; *Overstreet v. The State*, June term, 1871.

As this must necessarily reverse this cause, it is unnecessary to go into the other exceptions, as they are of such a character as will not, in all likelihood, again occur.

Let the judgment of the court be reversed and the cause remanded for a new trial, unless the said Boles, the defendant below, be otherwise legally discharged.

HUDGINS vs. THE STATE.

[INDICTMENT FOR SELLING LIQUOR, &C., CONTRARY TO PROVISIONS OF SECTION 2 OF ACT TO INCORPORATE FORT BROWDER MALE ACADEMY.]

1. *Corporation, cause of forfeiture against; can only be taken advantage of by direct proceeding.*—A cause of forfeiture can not be taken advantage of, or enforced against a corporation collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation.
2. *Same.*—On an indictment under section 2 of the act entitled “An act to incorporate the Fort Browder male academy, in Barbour county,” approved February 8, 1858, for selling spirituous liquors or wines within half a mile of said academy, except for medical purposes, it can not be collaterally shown, as a defense, that the charter granted by said act has been forfeited by *non-user*, or otherwise.
3. *General license; what not defense to.*—Nor is a general license to retail spirituous liquors, &c., issued by the probate judge, any defense to such an indictment.

APPEAL from Circuit Court of Barbour.

Tried before Hon. J. McCaleb Wiley.

Appellant was indicted and convicted at the fall term, 1870, of Coffee circuit court, under the provisions of section 2 of an act to incorporate the Fort Browder male academy, approved February 8, 1858, which makes it an indictable offense to sell liquors or wines within half a mile of said academy, except for medical purposes.

It was admitted that the appellant sold spirituous liquors to the person, and at the time and place, as charged in the indictment; but the defense set up was a general license from the probate judge of the county, taken out in pursuance of the revenue law, and that the Fort Browder male academy had forfeited its charter and franchises by *non-user*.

“It was admitted that the corporators named in the act had organized according to the provisions of the charter soon after its passage, and employed a teacher for one year, and since then have done nothing in respect to said

school ; that teachers have been employed by the township trustees and other persons in the neighborhood ; that for a considerable length of time there has been no school at Fort Browder ; that for the last five years spirituous liquors have been sold within half a mile of the academy ; that there has been no meeting of the trustees of said academy in ten years, and that during this time they have exercised no control whatever over said academy. It was further admitted that Wilson, one of the incorporators, had been engaged in business and selling spirituous liquors at Fort Browder for five years, under license from the probate judge, and at the time charged in the indictment defendant had taken out a license to sell spirituous liquors from the probate judge."

This was all the evidence in the case.

The appellant requested the following written charges :

"1. That the act incorporating the Fort Browder male academy created a private corporation.

"2. That private corporations may forfeit their franchises by *non-user*.

"3. That private corporations may be dissolved by the assent of the incorporators themselves, and that assent need not be by formal resolution or action on the part of the incorporators, but may be inferred from the facts of each case ; and that in determining the question whether they had surrendered their corporate franchise or not, the jury may look at all the facts of the case."

The court gave these charges, and then refused to refer to the jury the question of the forfeiture of the franchise by *non-user* or otherwise, but charged them that the act to incorporate the Fort Browder male academy remained in force until repealed by the legislature or vacated by a judicial proceeding. The court, at the request of the State, further charged the jury, that if they believed the evidence, they must find the defendant guilty.

The defendant excepted to the refusal of the court to refer the question as to the dissolution of said incorporation to the jury, and to each of the charges given, and these rulings are now assigned as error.

SHORTER & BROTHER, for appellant.—Although the rule is different with municipal corporations, (24 Ala. 398,) *private* incorporations may be dissolved by the action of the incorporators themselves, either by a surrender of its privileges, or “by any act equivalent to such a surrender.” They may also forfeit their franchise by *non-user*.—9 Ala. 738 ; 11 Ala. 472.

The evidence in the case clearly showed that the incorporation of the Fort Browder male academy had for many years been dissolved by the action of the incorporators. They had held no meeting for ten years. The people in and around the town of Fort Browder treated the incorporation as dissolved, and had been accustomed for many years to retail spirituous liquors in the town and within a half a mile of the school house, under license granted by the probate judge of Barbour county.

After giving all three of the charges asked by the defendant's counsel, the court in effect refused the charges, by declining to let the jury decide the question whether the charter or franchise had been forfeited by *non-user* or otherwise, or whether the incorporation had been dissolved by any act of the incorporators themselves. This was the only material question in the case, and it was a question of *fact* which the *jury* alone had the right to determine.

The act to incorporate the Fort Browder male academy created a private incorporation.—33 Ala. 106 ; 31 Ala. 552.

2. In the event that the forfeiture of the charter by *non-user* will not avail the defendant, and protect him from a prosecution in this instance, we present to this court the precise question decided in *Dorman v. The State*, 34 Ala. Private acts incorporating particular localities, and *prohibiting* the sale of whisky within a given territory, are as much unconstitutional as if they prohibited the sale of meat and bread. See the able argument of the attorney for the appellant in *Dorman v. The State*, *supra*.

ATTORNEY-GENERAL, *contra*.—Contended that the forfeiture could only be taken advantage of by a direct judicial proceeding ; that therefore it was proper to withdraw the con-

sideration of this question from the jury; that the act incorporating the academy being still of force, the judge of probate had no lawful authority to grant a license to sell liquors within the limits prescribed by the charter, and that this being so, and defendant having admitted the facts charged in the indictment, it was proper to charge the jury that defendant was guilty if they believed the evidence. He further contended that the question settled in *Dorman v. The State*, 34 Ala. 218, had been acquiesced in for years, and came directly within the influence of the doctrine of *stare decisis*.

PECK, C. J.—The circuit court committed no error in refusing to refer to the jury the question of the forfeiture, by *non-user* or otherwise, of the charter and franchise granted by the act entitled “An act to incorporate the Fort Browder male academy, in Barbour county,” approved February 8, 1858, Acts 1857–8, p. 85. That question could only be inquired into and determined in a direct proceeding instituted in the name of, and by the authority of, the State.

The franchise granted by said act could not be collaterally assailed on the trial of this indictment.—*The State v. Moore & Ligon*, 19 Ala. 514; Angell & Ames on Corporations, § 177.

2. Nor was there any error in the charge of the court, that said act would continue in force until repealed by the legislature, or until the charter thereby granted was vacated by a judicial proceeding instituted for that purpose.

3. As the defendant admitted that he sold spirituous liquors at the time, place, and to the person charged in the indictment, the court properly charged the jury, that if they believed the evidence, they must find the defendant guilty. The license issued by the probate judge was no defense for selling spirituous or vinous liquors within the limits specified in said act, except for medical purposes.

4. The constitutionality of special acts of the legislature prohibiting the sale of spirituous liquors, &c., within certain districts, or within a certain distance of places

 Johnson v. The State.

named in such acts, except for medical purposes, &c., was settled by this court in the case of *Dorman v. The State*, 34 Ala. 216.

For myself, I do not approve of that decision, and think it would have been better if it had declared such acts unconstitutional; but that decision has been acquiesced in from that time to this, and we are not now disposed to disturb it.

Let the judgment be affirmed, at appellant's costs.

JOHNSON vs. THE STATE.

[AMENDMENT OF INDICTMENT.]

1. *Indictment; amendment of; when not permissible.*—The amendment of an indictment, without the consent of the accused and against his objections even in an immaterial particular, is an unsafe practice and a reversible error.
2. *Same; form of given in the Revised Code sufficient.*—An indictment in the form prescribed by the Revised Code sufficiently shows a prosecution carried on in the name and by the authority of the State.

APPEAL from City Court of Montgomery.

Tried before Hon. JOHN D. CUNNINGHAM.

The indictment in this case, which was properly filed and endorsed, was as follows :

STATE OF ALABAMA,	}	CITY COURT,
County of Montgomery.	}	October Term, 1870.

The grand jury of said county charge, &c., that before the finding of this indictment, Andrew Johnson (colored) on his examination, &c., falsely swore, &c., [here follows the facts constituting the perjury,] against the peace and dignity of the State of Alabama.

J. S. WINTER,

Solicitor of Montgomery county.

The defendant demurred to the indictment—

1. Because there is no such court as the “city court” known to the laws of Alabama.

2. Because it does not appear from the indictment that the prosecution was carried on in the name of and by the authority of the State of Alabama, but, on the contrary, appears that it is carried on in the name and by the authority of the grand jury of Montgomery county.

Thereupon the solicitor asked leave to amend the indictment by inserting in the caption the words “of Montgomery,” just after the word “court,” and by inserting below the date, “1870,” the words, “in the name and by the authority of the State of Alabama,” and the court, against the objection of defendant, allowed the motion, and the indictment was accordingly amended. The defendant reserved this objection by bill of exceptions, and having gone to trial on plea of not guilty, and been convicted, brings the case here by appeal, and now assigns as error the overruling of his objection to the amendment of the indictment, together with other rulings not necessary to be further noticed.

J. FALKNER, for appellant.—Indictments may be amended in some particulars by the consent of the accused, but in no case without his consent.—See Rev. Code, § 4143; *Gregory v. The State*, at this term.

2. The constitution of the State, art. 6, § 19, is as follows: “The style of all processes shall be *The State of Alabama*, and all prosecutions shall be carried on in the name and by the authority of the State of Alabama, and shall conclude against the peace and dignity of the same.” Under the forms in use before the adoption of the Code of 1853, all indictments commenced in this way: “The grand jury of the State of Alabama, impaneled, sworn and charged to inquire for the body of (such a county) upon their oaths present, &c.” Under this form of indictment it is plausible at least to say that the indictment “was in the name and by the authority of the State of Alabama.” But under the form of indictment used in this case, there is noth-

ing in the indictment to indicate that the "prosecution is carried on" either in the "name" or "by the authority of the State," but it is really in the name and by the authority of the *grand jury*. It does not aver that the grand jury in the name and by the authority of the State "charge &c," but they make the charge in their own names, or in the name of the foreman or the solicitor, as their names alone appear to the indictment. Should it be said that the indictment commences "*The State of Alabama*," to this we reply that this is "the style of the process," and is also the style of all process in civil suits which are confessedly not in the name of the State, but are in the names of the parties beginning the suit as they appear in the body of the process, but the name or authority of the State does not appear in the body of this process (indictment); therefore, the indictment does not come up to this requirement of the constitution, and "in the name and by the authority of the State of Alabama," as required by the constitution. If it does fill this requirement, then it may be contended just as well that every civil action is in the name and by the authority of the State of Alabama, because the process in those actions commence "*The State of Alabama*," and the proceedings are authorized by the laws of the State, and in that sense they are by the authority of the State. But this constitutional requirement evidently means more than this, else why insert it in the constitution as to *State cases*, and not as to *civil suits*. The framers of the constitution certainly intended that the process (indictment) should show upon its face that the charge should be made by the State and by its authority, and that this should appear upon the face of the charge or indictment, and that the accused should be able to see, from reading the document, that "the sovereign State was his accuser, and that the charge was made by the authority of the sovereign people," and this is the very thing that does not appear. The constitutional provision, above quoted, meant something, and has some force, and the only way to give it meaning and force is to require indictments to be in the exact language of the constitution. It will not do to say that the

name of the State is indorsed on the back of the indictment, and also on the docket. This is no part of the work of the grand jury, but a mere memoranda, made by the officers of the court to distinguish cases, and is done after the prosecution before the grand jury is at an end. It is true that this court has frequently decided that the forms given in the Code are sufficient, but the rule universally obtains in all courts that decisions on points, or rather embracing and covering points, which have not been presented or considered, are never considered binding even on the courts or judges making such decisions. Applying this rule in this case, we do not find that this question has ever been raised or considered in this court. We, therefore, propose to raise it for the first time in this court. It being a constitutional question, and a provision inserted in that instrument for the benefit of the citizen, every citizen has a right to insist on it for his protection.

3. Again, it is apparent from the language at the conclusion of the indictment, that the constitution has been departed from. Its language is, "and shall conclude *against the peace and dignity of the same*." In this indictment, and in all the forms laid down in the Code, the conclusion is "against the peace and dignity of the State of Alabama." Now, we say that the word "*same*," in the constitution, refers back to the other words, which were required by that instrument to be in the body of the indictment, to-wit, "*in the name and by the authority of the State of Alabama*," and if these words were in the indictment, then it would be natural and good language to say "against the peace and dignity of the same," in the language of the constitution; but, those words being left out of the indictment, it becomes necessary to change the language as to the words put into the indictment, and instead of the constitutional word "*same*," the pleader, to make sense, has to drop that word and say "against the peace and dignity of the State of Alabama."

ATTORNEY-GENERAL, *contra*.

B. F. SAFFOLD, J.—The sentence in this case must be

reversed on the authority of *Gregory v. The State*, at the present term.

The objection made by the appellant that the indictment in the form prescribed by the Revised Code is defective in not showing sufficiently that the prosecution is carried on in the name and by the authority of the State of Alabama, is not well taken. The objection is applicable to all indictments. The provision of the constitution referred to is the same as that contained in the constitution of 1819, on the same subject. This court has repeatedly held that the form of indictment prescribed by the legislature in the Revised Code is sufficient.

The indictment shows that the grand jury of a particular county in the State charged the defendant with a specified offense. They are the tribunal especially appointed to inquire into all offenses against the criminal law committed in their county, and due presentment make of them by indictment. The charge averred that what was done, was against the peace and dignity of the State of Alabama, and it was signed by the solicitor, an officer appointed to prosecute all such cases in behalf of the State. This abundantly shows a prosecution carried on in the name and by the authority of the State.

The judgment is reversed and the cause remanded.

BARKER vs. BELL ET AL.

[CONTEST ON PROBATE OF WILL.]

1. *Will ; how only can be republished.*—In this State, the republication of a will is the making of a new will, and such republication must be made with all the formalities required by law.
2. *Same.*—A will with the name of the maker and the names of all the subscribing witnesses save one torn off, can not be republished without a new signing and attestation, as required by the statute in the case of making a new will, where it appears that the cancellation was committed by the testator himself with the intention to cancel the will ; and

Barker v. Bell et. al.

this, although after such cancellation, the testator may have spoken of such canceled will as "his will."

3. *Probate court; rules of evidence in.*—The same rules of evidence govern in trials of contested wills as in courts of common law. Interest does not disqualify a legatee from testifying.
4. *Witness, recall of; rests in discretion of court.*—It rests in the sound discretion of the court to allow a witness to be recalled. Where a witness is recalled against the objection of the party summoning him, after he had dismissed him, such witness is the witness of the party so calling him back, and can not be impeached by such party.

APPEAL from Probate Court of Cleburne.

Tried before Hon. W. R. HUNNICUTT.

The facts are set out in the opinion.

JAS. AIKIN, SOL. PALMER, and T. J. BURTON, for appellant. A will once revoked, in this State, can not be republished by parol.—*Witter v. Mott*, 2 Conn. 67; 1 Redfield, 374, § 14; *Love v. Johnson*, 12 Iredell, 355; 9 *ib.* 280; *Jackson v. Holloway*, 7 Johns. 394; *Jackson v. Potter*, 9 Johns. 312; 4 Desaussure, 305; 3 *ib.* 346; 1 Williams on Ex'rs, side p. 103.

The English statute of frauds is a part of the American common law. When section 1933 was enacted by the legislature, it was with reference to what was then the law of the land.

Therefore, they meant by the phrase, "duly republish the previous will," the re-execution of it, with the same formalities as if he were executing an original will.—See Rev. Code, § 1933.

Section 1913 of Revised Code passes all the real estate of testator at his death.

It is admitted by appellees that a will can not be republished so as to convey after acquired real estate, but under the above section it would convey that as well as any other.

Does the law prohibit a testator from revoking a written will, except by the same formalities as are observed in its execution, or by tearing, &c., and yet republish one which has been revoked by parol?—See Rev. Code, § 1933.

2. Even if a will could be republished by parol, the evidence in this case is wholly insufficient. It is all set out, on this point, in the bill of exceptions.—1 Williams on Ex'rs, 103, *et seq.*; Lomax.

ELLIS & CALDWELL, and FOSTER & FORNEY, *contra*.—When a will is found among the papers of the testator immediately after his death, in a mutilated condition, the presumption of law is that the mutilation is his act, and was done for the purpose of revocation; but rather the contrary is to be inferred when it is found two days afterwards in the possession of one who has an interest to defeat the will, or if it has been for that length of time under her control.—*Bryant Bennett, ex'r, v. Elizabeth Shenace*, 3 Ired. (Law) 303.

A republication may be by a re-execution, or by an act or declaration of the testator, that he intended the instrument which had been revoked should operate as his will. Bouv. Inst., 2 vol., 464.

This may be by parol, except in the case of after acquired lands, which will not pass by a parol republication. 5 Bacon Abr. 320; *Harvard v. Davis*, 2 Binney, 406; *Jones v. Hartley*, 2 Wheat. 103.

It is true that in England, since the statute of frauds, a will in writing can not be revoked by a parol republication of a former will. But the English statute contains this provision which our statute does not: "That no will shall be revoked except, &c., unless by some other will *in writing, or other writing* of the testator, signed in the presence of three or four witnesses, declaring the same." Our statute provides how a will may be revoked, but does not provide how it may be republished; leaving the republication as at common law, unaffected by the English statute of frauds, or by the statute of other States.—*Barnes v. Crow*, 1 Ves. 485; Jarman on Wills, vol. 1, p. 199; Com. Digest, 365; Powell on Devises, 652.

The second will was destroyed with the express intention of reviving the first, the will in question. The act of canceling that will and the declaration of republishing the

first will, were one and the same transaction, and did have the effect of republishing the present will.—*Jackson v. Potter*, 9 Johns. 314, and cases cited in note; *Burns v. Burns*, 4 Serjt. Rach, 295.

A parol republication might not pass after purchased lands, but no such question arises in this case on the charge given.—*Jackson v. Potter*, 9 Johns. 314; *Jackson v. Holloway*, 7 Johns. 394; *Lessee of Reynolds v. Shirley*, 7 Hammonds, (Ohio) 363.

To pass after acquired lands, there must be not only a republication, but a *re-execution*. Not so in this case.—*Roberts on Wills*, 477; *Ram. on Wills*, 165.

A will may be republished so as to *enlarge the operation* of the words used in a will, or it may not, as there may be more property for them to operate on, if property has been purchased by the testator. In this case, the republication does not affect the sense or operation of the words used in the will.—*Roberts on Wills*, 477; *Reynolds v. Shirley*, 7 Hammond, 363.

At common law, a will might be revoked or republished by parol. Our Code (§ 1932) provides how wills may be revoked, changing the common law, but is silent on the subject of republishing (§ 1933); consequently, it may be fairly presumed the legislature did not intend to change the common law on the subject of republication.

At common law, the cancelation of a second will republished the first; then there was not merely a cancellation or destruction of the second will, but it was accompanied with an express intention of reviving the first will.—*Goodnight v. Gleezie*, 4 Barr, 251-2.

PETERS, J.—This is a proceeding on the contest of a will before its probate, under our statute. There was a jury trial in the court below, and a verdict in favor of the will offered for probate, and a judgment of the court allowing the probate of the instrument offered, according to the verdict.

The evidence tends to show that there were two wills made by the decedent, Wm. M. Bell. The one was made

in January, 1868, and the other in May or June, 1868. This latter will was not produced on the trial, and there was no written evidence to show that it had been revoked or canceled. The testamentary paper of January, 1868, was the will offered for probate, and the one that was established by the decree of the court. It disposes of the real and personal estate of the testator. The issue covered all the ground of contest that could be made on such an instrument. The evidence tends to establish the allegation that it had been regularly made and attested, and declared to be the will of the party making it, to-wit, said Wm. M. Bell, as required by the Code. But after the death of Bell, the alleged testator, it was found in possession of his widow, with his name torn off and the names of the attesting witnesses very much mutilated, so as to leave all but one illegible. The name of the alleged maker could not be read at all, and the full name of only one of the attesting witnesses, of whom there were three, remained legible. There was proof going strongly to show that these obliterations had been made by the testator himself, while the will was in his possession; that he had handed it to his wife, or she had gotten it from his pocket, and that it was so obliterated when she obtained it, and that he had then declared that the obliteration was his work, and he intended it as a cancellation of the will. There was no testimony that this will had been canceled or torn by any other person. There was proof, also, that the testator had spoken of this paper, after the making and publication of the subsequent will of May or June, 1868, as "his will," and declaring that he had destroyed the will of May or June, 1868. This was in April, 1870, just before decedent's death.

On this evidence the court gave several charges to the jury which were excepted to by the contestants, and refused to give several others which were asked by the contestants, and the refusals were each made the basis of an exception. It is not necessary to notice the exceptions arising on the charges given, as like questions arise on the

charges refused. One of these charges is recited in the record in the following terms :

“ The contestants asked the court to charge the jury in writing, that the testator could not republish the will propounded by parol declarations alone.”

This charge should have been given. To refuse it was error.

The Code is intended to contain all the statute law of this State of “ a public nature, designed to operate upon all the people of the State up to the date of its adoption, unless otherwise directed in the Code.”—Code, § 10. This law is not merely cumulative of the common law, and made to perfect the deficiencies of that system, but it is designed to create a new and independent system, applicable to our own institutions and government.—Rev. Code, § 10. In such case, where a statute disposes of the whole subject of legislation, it is the only law. Otherwise, we shall have two systems, where one was intended to operate, and the statute becomes the law only so far as a party may choose to follow it. Besides, the mere fact that a statute is made, shows that so far as it goes, the legislature intended to displace the old rule by a new one. On some questions the common law conflicts more or less with our constitutional law, and is necessarily repealed and displaced and repealed by it. And on others it has, by lapse of ages, and mistakes inevitably attendant on all human affairs, become uncertain and difficult to reconcile with the principles of justice. Hence, the legislature intervenes to remove such difficulties, uncertainties and mistakes, by a new law. This new law, to the extent that it goes, necessarily takes the place of all others. For it would be illogical to contend that the old rule must stand, as well as the new one, because this would not remedy the evil sought to be removed and avoided.

Judged upon these principles, the statute law found in the Code, and such others as may have been since enacted on the subject of wills, in this State, include the whole law upon the making of wills, and their revocation, and the making of other wills in the place of those revoked.—Rev.

Code, § 420, Chap. II, *ad finem*. A will made in conformity with the requirements of this law, without fraud or undue influence, is valid as a testamentary disposition of the maker's estate. But if it is not so made, it can have no force as a will. Under this statute, the revocation by cancellation or obliteration, by the testator himself, destroys the instrument. From the date of the revocation, the will revoked ceases to be a testamentary disposition of the maker's estate. Such revoked will is nothing. It can have no effect as a will. And if the party who made it desires to make a testamentary disposition of his estate, he must make a new will, in the manner required by the statute. But in doing this, he may use the same form of words, without variations or with variations, as often as he pleases, and the same written or printed document that was used at first, but the process of making the will must be the same each time; that is, it must be done as prescribed by the statute. By our law, there can be no republication of a will that has been revoked by tearing off the names of the maker and the attesting witnesses, unless the will is re-signed and re-attested, as required by the statute. The signing of the will and the attestation of this signature are essential formalities that can not be dispensed with.—Rev. Code, §§ 1910, 1930-1; *Powell's Distr. v. Powell's Legatees*, 30 Ala. 697, 705; *Riley v. Riley*, 36 Ala. 496; 1 Redf. Wills, p. 191, bottom, §§ 206-7. The charge asked, as above set out, was confined to the instrument offered for probate in this case. The proof in this instance is not sufficient to establish the republication of such a will. Where a testator has made two wills, and wishes to destroy the one last made and revive the one first made, both of which have been duly executed, he may do so by the cancellation or destruction of the last made will, and the due republication of the previous will. But this due republication of the previous will can not be made of a will mutilated and canceled by the testator himself, without a re-making of the same, as required by the statute. Otherwise, a paper without the signature of the testator, and without attesting witnesses, might become a will.

This, except in certain cases, (and this is not one of the excepted cases,) the law forbids.—Rev. Code, §§ 1932-4, 1936; *Jackson v. Holloway*, 7 Johns. 394; *Jackson v. Rodgers et al.*, 9 Johns. 312; 1 Redf. Wills, p. 354, bottom, §§ 373-4; *James v. Marvin*, 3 Conn. 576; 10 Bac. Abr. Bouv. p. 505. A republished will is a new will, and it must have all its parts complete.—1 Williams on Ex'rs, 113, 121, margin. This instrument can not be made a new will without the testator's signature, and the signatures of the proper number of attesting witnesses. These requisites it does not possess.—Rev. Code, § 1930; 1 Redf. Wills, 347, bottom, *et seq.*

In all matters in relation to the evidence and mode of proceeding in the court of probate on the contest of a will, where there is no special exception, the court must proceed and be governed by the same rules and regulations as courts of common law.—Rev. Code, § 1962. In such a contest, the legatees are competent witnesses for the proponent, or for the contestant.—Rev. Code, § 2764; Pamph. Acts 1866-7, p. 335, No. 403. The court did not err in permitting one of the legatees to testify in favor of the validity of the will.

The conduct of the trial is under the sound discretion of the court. The court may therefore allow a witness to be called back for re-examination, but can not compel either party to call back his witness, unless he choose to do so. In case a witness is so called back after being dismissed by the party who summoned him, he becomes the witness of the party calling him back against the objection of the other party; and such witness can not be impeached by the party so calling him back. In this view of the law the contestants were not injured, as the testimony strengthened their case.

The other exceptions are such as are not likely again to arise on a new trial. I therefore omit their consideration.

The judgment of the court below is reversed, and as the parties are entitled to a trial by jury, (Rev. Code, § 1956,) the cause is remanded and a new trial is ordered.

THOMPSON vs. RAY.

[TROVER FOR CONVERSION OF COTTON.]

1. *Sale, contract of; non-performance of condition; what does not excuse.*
If by the terms of a sale the property in the thing sold is to pass to the vendee upon his deposit of the purchase-money at a particular bank, the refusal of the bank to receive it will not excuse the non-performance of the condition.
2. *Contract, assent of parties to; to what has not reference.*—The principle of the law of contracts that both parties must assent to the same thing, and in the same sense, has no reference to the misconceptions of the parties not authorized by the terms of the agreement.

APPEAL from the Circuit Court of Montgomery.

Tried before Hon. J. Q. SMITH.

The facts are sufficiently stated in the opinion.

ELMORE & GUNTER, for appellants.—I. The first charge asked is in these words: "That if the title to the cotton was to pass to the defendant upon his deposit of the thing agreed to be given, into the bank, the refusal of the bank to receive the same is no excuse for not making the deposit, and the title would not pass until it was made."

This first charge asserts a correct proposition of law and should have been given to the jury.—1 Parsons on Cont. 537; Benj. on Sales, 425; *Stinson v. Dousman*, 20 How. 461; *Neil v. United States*, Dev. C. C. 117; *Beebe v. Johnson*, 19 Wend. 500; *Blacksmith v. Fellows*, 7 N. Y. (3 Seld.) 401; *People v. Dibble*, 16 N. Y. (2 Smith) 203; *Dill v. Camp*, 22 Ala. 249; *ib.* 27 Ala. 553; *Morrow v. Camfield*, 7 Porter, 42.

The charge was not abstract, for the bill of exceptions states that there was evidence in the cause to the effect that the contract of sale was upon the express condition that the money or thing agreed to be given was to be deposited in the bank on the next day.

II. The second and third charges asked and refused, involve the principle of law in the first charge with this other one, viz: "That there is no contract, unless the parties assent to the same thing and in the same sense"; which is too clear to admit of doubt.—See 1 Parsons on Contracts, 475, and cases there cited; *Falls & Caldwell v. Gaither*, 9 Port. 605; *Eliason v. Henshaw*, 4 Wheat. 228; *Dill v. Camp*, 22 and 27 Ala.; Benj. on Sales, p. 36.

MARTIN & SAYRE, *contra*.—[Appellee's brief did not come into Reporter's hands.]

B. F. SAFFOLD, J.—The appellant having sued the appellee for the conversion of twelve bales of cotton, the issue became resolved into the question whether a contract for the sale of the cotton, made between the parties, had been so far completed as to pass the property to the vendee, Ray. The plaintiff claimed that it was a precedent condition of the sale that the defendant should deposit the purchase-money at the Central Bank of Montgomery on the next day, which he failed to do for some time afterwards, and until he had notified the warehousemen not to deliver the cotton to him. The defendant denied the condition, insisting that the sale was absolute. He admitted that the money was not deposited at the bank, or tendered to the plaintiff, until two or three weeks after the sale, but claimed that he had offered to deposit it at the bank a day or two thereafter, and the bank refused to receive it.

The plaintiff asked the following charge, which was refused:

"If the title to the cotton was to pass to the defendant upon his deposit of the thing agreed to be given into the bank, the refusal of the bank to receive the same is no excuse for not making the deposit, and the title would not pass until it was made." This charge ought to have been given. It was the point of the controversy, and contained the essence of the contract. If a party covenant to do an act, the difficulty or improbability of accomplishing it, not involving any fault of the other party, will not

excuse him.—*Beebe vs. Johnson*, 19 Wend. 500. The property in the thing sold passes to the purchaser upon the completion of the sale, whether the sale is completed or not being a question of fact for the jury.—1 Parsons on Contracts, 440-441. Whether this deposit, though agreed to be made, was in fact a material ingredient of the sale, was also embraced in the charge and might have been more prominently exhibited by appropriate charges asked by the defendant.

There were two other charges asked by the plaintiff and refused. These charges are as follows :

"If Thompson's understanding of the contract was that the cotton was sold on condition of Ray's depositing the money on the next day in the Central Bank, and Ray did not make the deposit on the day fixed on, then the title did not pass to Ray, although Ray's understanding of the contract was different, and Ray sold the cotton, he is liable."

"If the jury find from the evidence that Thompson intended to sell the cotton on condition that Ray should deposit the thing or consideration agreed to be given in the Central Bank on the next day, and Ray did not make the said deposit in said bank on the next day, and afterwards sold the cotton, he is liable to the plaintiff, although the jury believed from the evidence that Ray in making the contract did not intend to buy the cotton on such condition."

The charges refused assert that a disagreement between the parties as to the conditions of the sale would vitiate the contract without regard to the reasonableness of the construction given to its terms by the one or the other of the parties. It is true, that there is no contract unless the parties assent to the same thing, and in the same sense. But if one seeks to convey his meaning by expressions importing something different, or attaches to the proposition of the other a significance not authorized, whatever injury may result from the misunderstanding must be visited upon him.

The judgment is reversed and the cause remanded.

SLOCOVITCH *vs.* THE STATE.

[TRIAL OF INDICTMENT FOR SELLING LIQUOR, &c., WITHOUT PERSONAL PRESENCE OF ACCUSED.]

1. *Trial for indictable offense, cannot be had without personal presence of prisoner.*—No person indicted for a criminal offense, whether it be for a felony or a misdemeanor, can be tried without being personally present in court, and a judgment rendered upon a conviction obtained in his absence, if for a fine only, is erroneous, and will be reversed on appeal.

APPEAL from the Circuit Court of Mobile.

Tried before Hon. C. F. MOULTON.

The case is fully stated in the opinion.

Neither the docket nor transcript shows the name of appellant's counsel.

Attorney General, *contra*.

PECK, C. J.—At the last February term of the city court of Mobile, the appellant was indicted for selling vinous and spiritous liquors without a license, and contrary to law.

Before the close of the term, he was arrested on a *capias*, issued for that purpose, and entered into an undertaking of bail, with two sureties, before the sheriff, for his appearance at the then present term of said court, and from term to term, until discharged by due course of law.

During the said term, the accused was called, and failing to appear, a judgment *ni si* was entered against him and his sureties; thereupon, on motion, the solicitor was permitted to proceed with the trial, without the appearance of the accused, and in his absence. The jury found him

guilty, and assessed a fine against him of fifty dollars, and a judgment was rendered for that sum and the costs of the prosecution. From this judgment the accused appeals to this court. The judgment must be reversed. In this State from the beginning, and, so far as we know, without exception, the practice has been to allow no one to be tried for an offense, whether for a felony or misdemeanor, in his absence. Section eighth of our bill of rights declares, "That in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; to have a copy thereof; to be confronted by the witnesses against him; to have compulsory process, for obtaining witnesses in his favor; and in all prosecutions by indictment or information, a speedy public trial, by an impartial jury of the county or district, in which the offense was committed; and that he shall not be compelled to give evidence against himself, or be deprived of his life, liberty or property, but by due process of law."

To try a party in his absence, in such a case, is to deprive him of many of the rights and privileges secured to him by this section of the bill of rights.

In this case, the trial was had, not only in the absence of the accused, but also without any plea or issue either of law or fact.

There can be no trial on the merits, in a criminal case, until the defendant has pleaded not guilty, or this plea has been entered for him by the court.—1 vol. Bishop's Crim. Prac. § 468; *Sartorious v. The State*, 24 Miss. 602. Section 4169 of the Revised Code provides, that "if a defendant, when arraigned, refuses or neglects to plead, or stands mute, the court must cause the plea of not guilty to be entered for him."

This shows the necessity of the personal presence of the defendant, on a criminal trial, and that no trial can be had in his absence. If absent, he cannot be said to refuse or neglect to plead, or to stand mute; and it is only when he refuses or neglects to plead, or stands mute, that the court can cause the plea of not guilty to be entered for him.

Let the judgment of the court below be reversed, and the cause be remanded for further proceedings.

MOSES *vs.* CLARK.

[ACTION ON PROMISSORY NOTE.]

1. *Executors ; promissory note payable to ; when title to vests in holder.*—A promissory note payable to executors, transferred by them in payment of a liability of the estate of equal amount, may be sued on by the holder. These facts will protect the maker against any suit instituted by an administrator *de bonis non* or other representative of the estate.

Tried before Hon. J. McCaleb Wiley.

APPEAL from Circuit Court of Barbour.

The appellant was the plaintiff in a suit for the collection of a promissory note, which the appellee made in favor of Shorter and Baker, the executors of the will of Milton A. Browder, deceased. The consideration was property bought by him at a sale of the personal property of the estate by the executors, under an order of the probate court.

The defendant pleaded that the plaintiff was not the owner of the note. The evidence showed that the above named executors endorsed the note to the executor of Mrs. Browder in payment of so much of her distributive share of her husband's estate, and he had charged himself with it, and had accounted for it in his final settlement of her estate, upon which he had been discharged. The executors of M. A. Browder had charged themselves with the amount as money collected, and had accounted for it as above stated on a partial settlement of their administration. There had been no final settlement of the last mentioned estate, and no partial distribution under any order of the

Ex parte Selma & Gulf Railroad Company.

probate court. The disposition made by the executors of this note was of their own motion, without any authority from the court. This being all the evidence, the court, at the request of the defendant, charged the jury that "if they believed the evidence they must find for the defendant." The appellant excepted, took a non-suit and bill of exceptions, with leave to set aside the non-suit in the supreme court.

JOHN M. McKLEROY, for appellant.

F. M. WOOD and D. M. SEALS, *contra*.

B. F. SAFFOLD, J.—The plaintiff was entitled to recover if the judgment would protect the defendant against any demand that might be set up in behalf of M. A. Browder's estate. No representative, distributee or creditor of that estate could regain from him the property purchased. If sued by any of them, in any form, the facts shown in the bill of exceptions would be a defense to the suit.

The estate of Browder had received an equivalent, and plaintiff was not bound to see that the executors committed no devastavit.

The judgment is reversed and the cause remanded.

EX PARTE SELMA AND GULF RAILROAD CO.

[APPLICATION FOR MANDAMUS.]

1. *Act amending act to regulate the publication of legal and other notices in the State of Alabama; what not repealed by.*—The act of the 10th of October, 1866, entitled, "An act to amend an act entitled an act to regulate the publication of legal and other notices in the State of Alabama," does not repeal § 830 of the Revised Code, and, therefore, a special term of a commissioners court, held by direction of the judge of probate, upon ten days notice, by advertisement in some newspaper

Ex parte Selma & Gulf Railroad Company.

in the county, or by posting up at the court-house door and two other public places in the county, notice of the same, is a lawful special term of said court.

2. *Proposal of railroad company to commissioners court; may be made to a special term.*—A proposal of a railroad company, under the act entitled, “An act to authorize the several counties and towns, and cities, of the State of Alabama, to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their respective interests,” approved 31st December, 1868, if it conform to the provisions of said act, may be made to a special term of a court of county commissioners, and such proposal will give said court jurisdiction to make an order to submit said proposal to the qualified electors of said county for their acceptance or rejection; and an election duly held under such order, if it result in favor of subscription, will authorize said court to subscribe, on behalf of such county, to the capital stock of said railroad company, and to issue the bonds of such county in payment of the same.
3. *Mandamus; when will be granted to compel subscription, &c.; what proposition gives court no jurisdiction to order election, &c.*—If said court, after such election, if in favor of subscription, refuses to subscribe for the amount of stock named in such proposal, and issue the bonds of the county in payment of the same, it may be compelled to do so by *mandamus*; but if said proposal contains another proposition in addition, as to build a passenger and wagon bridge across a river running through said county free of toll to all the people of the State, such proposal, containing such an additional proposition, will confer on said court no jurisdiction to submit such proposal to the qualified electors of the county for their acceptance or rejection, and an order of said court, and an election held under it, will be invalid, and will give to said court no authority to subscribe to the capital stock of said railroad company, and issue the bonds of the said county in payment of the same.
4. *Same.*—An application for a *mandamus*, in such a case, to compel a court of county commissioners to subscribe to the capital stock of a railroad company, and pay for the same in the bonds of the county, will be denied.
5. *Alternative mandamus; return to, need not be single.*—A return to an alternative *mandamus* need not be single, but may contain several causes or defenses, and if one be sufficient, a peremptory *mandamus* will not be issued.

At a former day of the term the court, on the petition and motion of the Selma & Gulf Railroad Company, granted an alternative *mandamus* to the court of county commissioners of Dallas county, commanding said court to subscribe \$250,000 to the capital stock of the Selma & Gulf Railroad Company, and to issue bonds of said county in

payment of such capital stock, &c., in accordance with the proposition of petitioner, submitted to said court, and the vote of the people of Dallas county, at an election ordered thereon, and held on the 6th day of August, 1870, or else show cause on the 6th day of July, 1871, why said subscription was not made and said bonds issued according to the mandate of the writ, &c.—See *Ex parte Selma & Gulf Railroad Company*, 45 Ala. 696.

On the 3d day of July, 1871, the court of county commissioners made a return to the writ, and set up in substance the following grounds why the peremptory *mandamus* should not issue :

1. That there was no regular term or adjourned term of the court of county commissioners held on the 28th day of June, A. D. 1870, the day when the proposal or proposition of the Selma & Gulf Railroad Company for said subscription, &c., was made to said court, &c.

2. That said special term, at which said proposition, &c., was made, was begun and held by virtue of a notice published by direction of the judge of probate in the "Selma Times," (a newspaper published in said county,) on the 19th day of June, A. D. 1870, and daily thereafter until the 28th day of June, 1870, which notice, so published, was in the following words :

" COMMISSIONERS COURT.

" A called meeting of the commissioners court will be held on the 28th day of June.

JOHN F. CONOLY,

jel9-dtd

Judge of Probate."

On the 25th day of June, 1870, the same notice, by direction of the probate judge, was published in the "Selma Press," a newspaper published in said county. No other notice than the above was given. "Prior to the 28th day of June, 1870, and some time in 1869, the probate judge of Dallas county, in pursuance of the authority invested in him by law, had, on the 14th day of January, 1869," designated the "Selma Press," a newspaper published in the city of Selma, "as the medium through which all legal

advertisements, notices or publications of any and every character, required by law to be made in the county, should be published," and this order or designation was of force and not changed or modified in any manner at the time of said publications, and this notice was only published in the "Selma Press" until the 25th day of June, A. D. 1870.

3. That the election held in Dallas county, on the 6th day of August, A. D. 1870, on said proposition of the Selma & Gulf Railroad Company, which resulted in favor of "subscription," &c., was held under virtue of the order of the court of county commissioners, made as aforesaid on the 28th day of June, A. D. 1870.

4. The fourth ground set up is, in substance, that in the proposition of the railroad company, which was submitted to the people of Dallas county, it was agreed that the county of Dallas, represented by the court of county commissioners, and the railroad company, should have an equal voice in determining the use of the bridge by other railroad companies; said right of the county of Dallas not to be affected or impaired by any sale, transfer or assignment of the corporate rights and franchises of said railroad company, but the right to remain intact with the county of Dallas to an equal vote upon the allowance of the use of such bridge to any other railroad, &c., and "since that time said railroad company has accepted an endorsement of its bonds from the State of Alabama under the laws in such cases made and provided, &c."

5. That the Selma & Gulf Railroad Company, in their proposition, and as a part thereof, also proposed, "that in connection with the said railroad bridge, the said company will build a passenger and wagon bridge across the Alabama river, to be free to all the people of the State of Alabama," and the said election, so held on the 10th day of August, 1870, was held on the entire proposition submitted as aforesaid, and not on any separate part thereof.

The proposal of the railroad company to the court of county commissioners and its action thereon, and the min-

Ex parte Selma & Gulf Railroad Company.

utes of the court, are made an exhibit to the petition and prayed to be taken as part thereof.

The caption of the minutes of the court of county commissioners, in the record of the proceedings of that court, is as follows :

"STATE OF ALABAMA,	}	Court of County Commissioners, Special Term.
Dallas county.		

June 28th, 1870.

This being the day directed by the Honorable John F. Conoly, judge of probate of Dallas county, for the holding of a special term of the court of county commissioners for said county, and of which due and legal notice has been given by advertisement for ten days in newspapers published in Dallas county, thereupon came the Hon. John F. Conoly, judge of probate, and R. C. Goodrich, C. L. Maththews and J. E. Kennedy, county commissioners, and the court being duly organized, opened and in session, the following proceedings were had," &c., &c.

The proposal of the railroad company was as follows:

"To the Honorable, the Court of County Commissioners for the county of Dallas and State of Alabama :

The undersigned, the president, and a majority of the directors of the Selma & Gulf Railroad Company, a corporate body, having a line of railroad situate upon and running through a portion of the county of Dallas, respectfully propose to the county of Dallas, to take two hundred and fifty thousand dollars, in the capital stock of said railroad company, amounting to twenty-five hundred shares, at the price of one hundred dollars per share, to be expended in the construction of a railroad bridge across the Alabama river, at the city of Selma, and to pay for such stock, in bonds of the county, having twenty years to run, with interest at eight per cent. per annum, payable semi-annually at such place in the city of New York as may be agreed on and designated on the face of such bonds, with coupons attached, for the semi-annual interest.

"Said railroad bridge to be for the use of such other railroad companies as may be agreed on between said

Ex parte Selma & Gulf Railroad Company.

Selma & Gulf Railroad Company and the county of Dallas, (each having an equal voice in determining such use,) represented by the court of county commissioners, said right of the county of Dallas not to be affected or impaired by any sale, transfer or assignment of its corporate rights, by said Selma & Gulf Railroad Company, or any sale or transfer of its railroad and appurtenances, but the right to continue intact with the county of Dallas, to an equal vote upon the allowance of the use of such bridge to any other railroad company than the said Selma & Gulf Railroad Company or its assigns.

"The undersigned further propose in behalf of said Selma & Gulf Railroad Company, that in connection with the said railroad bridge, that said company will build a *passenger and wagon bridge* across the Alabama river, to be free of toll to all the people of the State of Alabama.

(Signed,)

D. S. SMYLEY,
Pres't Selma & Gulf R. R. Co.

J. W. LAPSLEY,
J. W. PURIFOY,
WM. H. LINAN,
J. W. CALHOUN,

Directors.

On the filing of the return the Selma & Gulf Railroad Company appeared by counsel and moved the court to quash said return, on the ground of uncertainty and insufficiency, &c., and prayed that a peremptory *mandamus* issue.

J. C. COMPTON, and PETTUS & DAWSON, *contra*.—A special term of a court is not a part of a regular term. It is entirely distinct, and the power to hold a special term must be given by statute.—20 Ala. 446; 6 Yerger, 395; 2 Scammon, 303; 7 Yerger, 365; 2 Pike (Ark.) 229 and 250.

Special terms of courts of county commissioners *must* be held in cases provided by Revised Code, § 830.

The judge of probate is made the officer to determine when any one of these requirements are to be done; one of these essential conditions must exist *ten days* prior to

the meeting of the court, for the court can only legally assemble after ten days notice given in one or the other manner required by this section of the Code. The notice in this case was published in the "Selma Times, a newspaper published in said county on the 19th day of July, and daily thereafter until the 28th day of June, 1870," on which day the court was held.

Was this notice a *ten days* notice by advertisement in some newspaper in the county as is required by section 830 of the Revised Code?—*Garner v. Nevill & Johnson*, 22 Ala. 494, and cases cited; *Owen v. Slatter*, 26 Ala. 547, and cases cited.

"One essential ingredient to the exercise of jurisdiction by any court, for the sessions of which a time is appointed by law, is, that it act within *the time* prescribed, and should it fail to do so, or presume to act at another and a different time, such acts are absolutely void."—20 Ala. 446; 1 Ala. 351; 27 Maine, 114; 1 Scammon, 227; 2 Scammon, 555; 3 Blackf. 501.

The court of county commissioners is a court of special and limited jurisdiction, and *every fact* necessary to sustain its jurisdiction must affirmatively appear on the face of its records. As a general rule nothing will be intended in favor of its jurisdiction.—*Cooley's Const. Lim.* page 406; 3 Phil. Evidence, 1013, 987, 1021, 1104; *Trammel et al. v. Pennington*, 45 Ala. 673, and cases there cited.

In this case we insist that it must appear that the court was called after *ten days* notice in one of the ways provided by law, by the judge of probate, and for one of the three purposes for which such a term of the court could be held; no intendment can assist the record to show that this special term was directed by the judge of probate to be held to "perform a special duty required by law," to-wit: to submit the proposal of the Selma and Gulf Railroad Company to the electors of the county. Their proposal was never made to the court, nor was it filed until the 28th day of June, 1870, the day on which this term of the court was held.

A record is not commonly suffered to be contradicted by parol evidence, but in the case of a court of special and limited authority, it is permitted to show a want of jurisdiction even in opposition to the recitals contained in the record.—Cooley's Const. Lim. page 407, and cases cited.

When several matters in the progress of a cause have been acted on by an inferior court, and the court ascertains before the final act in the cause that it has erred in its proceedings, it is the duty of the court, and it has the right not to proceed further; and when an effort is being made by mandamus to compel it to do the final act, it may set up in its answer or return to the superior court, all the facts concerning its previous procedure in the cause, even if it sets out in the answer or return facts which conflict with its record of the proceedings. This it may do, that the superior court may determine whether or not an error has been made in its proceedings, and whether it should be compelled to proceed with the cause.

The counsel for the motion insist that the record of the court in this case, shows that the court ascertained the preliminary jurisdictional fact, that this special term had been properly convened, and that the return of the court can not question it. This doctrine is true in regard to *third parties* and *collateral* proceedings. When the case is not determined it is otherwise.—Cooley's Const. Lim. pages 406 to 409, and cases cited.

The Selma and Gulf Railroad Company having mortgaged to the State of Alabama by its acceptance of the State endorsements of its bonds to the extent of sixteen thousand dollars per mile, its "entire road within" the State, and the franchise granted by the State or under its authority, including the right of way, grading, bridges, masonry, rails, spikes and joint fastenings, and the whole superstructure and equipments, and all the property owned by the company as incident to or necessary for its business, including depots and depot stations, and all other property real or personal belonging to said company, *or hereafter to be acquired by them*, for the payment of all of said bonds endorsed for the company."—(Acts 1869–70, page 151.)

Ex parte Selma & Gulf Railroad Company.

It is insisted that this action of the railroad company was in violation of the terms of the accepted proposal made by them to the electors of the county, and that they can not enforce the payment of the subscription.

The return is not inconsistent, nor does it set out inconsistent causes why it does not obey the rule. It states the truth of the manner in which notice by the judge of probate was given, and the words of the notice, and the number of times of its publication, and in express terms negatives that notice was given in any other manner. "The return must state facts and not conclusions of law, must not be argumentative nor aver material facts by way of recital, but must positively and expressly assert, deny, or answer all facts in their full extent, the assertion, denial or avoidance of which may be for justification or defence." "It may contain several defences or justifications; and if one of these be sufficient the return must be allowed to that. It is sufficient, if it contain a legal reason for not obeying the writ, though certain facts of it are unsatisfactory; for these may be considered surplusage and the remainder tried."—Angel & Ames on Corporations, p. 709 and 710, and cases cited; Tapping on Mandamus, pages 352, 356, 357, 358; Moses on Mandamus, pages 210 and 214.

"Where the return is insufficient, the court will not ordinarily, in the first instance, order a peremptory writ, where there is the appearance of having a valid defense, but will direct the respondent to file a fuller and more perfect answer."—*State v. Jones*, 10 Iowa, 65.

ALEXANDER WHITE and S. F. RICE, for petitioner.—"The Statute of Ann. ch. 20, which allows the facts stated in the return to the alternative writ in cases of mandamus, to be traversed and tried by a jury, not being in force in this State, the facts must be pleaded with such a degree of certainty as to enable the court to decide whether they are in law sufficient to justify the party in failing to do the act."—*Com'rs Court of Tallapoosa v. Tarver*, 21 Ala. 661; 1 Har. & Johns. 557.

"Nor is a return sufficient, if it merely aver matter of fact

which the prosecutor may be able to falsify in an action on the case for a false return ; because such matter should be *so particularly* alleged, that the court should be able to judge of it, and determine whether it be sufficient or not." Tappan on Mandamus, 400; Mar. 359.

In the answer or return of defendant, according to the strict rules of the common law, the same certainty is required as in indictments, returns to writs of *habeas corpus*, counts, replications, &c.—*Cullum v. Latimer*, 4 Texas, 331.

The return, to be *sufficient*, must answer the writ with the *strict and technical* precision required by the ancient rules of the common law. Its averments must have certainty to *every intent*, or the same as in estoppels, indictments, or returns to writs of *habeas corpus*. It must set out facts, and not state conclusions only. If it denies the supposal of the writ, the traverse must be single, direct and certain.—*Harmon v. Marshall*, 10 Maryland, 451, 466; *Brosus v. Ructer*, 1 Har. & Johns. 557; Ang. & Ames on Corp. 937; *Rex v. Ipswich*, 2 Ld. Raymond, 481.

The return must state facts and not conclusions of law, must not be argumentative, nor aver material facts by way of recital; but must *positively* and *expressly* assert, deny or answer *all* facts in their *full extent*, the assertion, denial or avoidance of which may be necessary for justification or defense.—Ang. & Ames on Corp. 737; *Rex v. Malden*, 1st Ld. Raymond, 481; *Rex v. Ipswich*, 2 Ld. Raym'd, 1239; *Com. Bank v. Canal Com'rs*, 11th Wise, 25.

The record of the commissioners court is made a part of the return; and it shows upon its face that the ten days notice was given and every other fact necessary to constitute this a special term. Now, if it were allowable to dispute the record, (which we deny,) it would have to be settled by this court which averments of the return to believe, those which state that ten days notice was given, or those which say it was not given in due and legal form.

Repugnancy vitiates a return, and the court will on motion quash it and award a peremptory mandamus, and notwithstanding one of the inconsistent causes would have been good of itself.—Tappan on Mand. 403. marginal, 362.

Previous to the adoption of the Code the commissioners court could only hold regular terms. Before that time, when special terms were held, they were held by virtue of special acts.

The Code was designed (section 830) to supply this omission or vacuum, which was developed by the decision of this court.—*Wightman v. Karsner*, 20 Ala. 446, in January, 1852.

Section 830, Revised Code, provides, under the head of "The Court of County Commissioners," "Special Terms, notice thereof"—

"In cases where officers are to be appointed, or vacancies supplied, or *any other* special duty required by law to be performed, a special term must be held by direction of the judge of probate, upon ten days notice by advertisement in some newspaper in the county, or by posting up at the court-house door and two other public places in the county, notice of the same."

Under this statute the judge of probate is the officer appointed by law to judge of the exigency or occasion which requires that a special term of the commissioners court shall be held, and the direction by him and the advertisement of the fact that a special term of the court will be held is a judicial ascertainment of the fact that the exigency has arisen. The cases in which the special court may be held are numerous and diversified, and are of such a character that they may arise at any time, and when they have arisen or do arise must depend upon the discretion of the judge of probate.

This discretion is put into exercise and manifested when he directs a special term to be held and gives notice of the fact. The giving the direction and the notice by him, is an adjudication of the fact upon which the organization and constitution of the court depended, and his adjudication thereon is conclusive.—*Hamner v. Mason*, 24th A. R. 480; *Stuyvesant v. The Mayor*, 7 Cow. 588; *Martin v. Mott*, 12th Wheaton, 19.

When the fact upon which the power to act depends is referred by the law maker to be determined by the court or

Ex parte Selma & Gulf Railroad Company.

officer, the determination of the fact by such court or officer is *res adjudicata* and can not be questioned.—*Mason v. Hamner*, *supra*, citing *Wyatt's adm'r v. Rambo*, 29th A. R. 522; *Brittain v. Kinnard*, 1 Brod. & Bing. 432; *Mackaboy v. Commonwealth*, 2 Va. Cas. 269.

The record, when regular upon its face, is conclusive, though the proceedings are *ex parte*.—See cases above cited, and *Mather v. Hood*, 8 John. 36.

The jurisdictional facts being found by the court itself, in this case, and not by a jury or by any secondary instrumentality, and being put upon the record by the court, must in the very nature of the case be held to be conclusive. "It must be presumed that the court has kept a faithful record of its proceedings."—*Wait's Law & Practice*, vol. 2, 423.

What the law requires to be done and appear of record, can only be done and made appear by the record itself. *Elliott v. Pursol*, 1 Peters, 340.

The record of the commissioners court in this case, shows by the recitals of the record all the facts necessary to constitute it a special term, and like all other records of courts having jurisdiction, it imports absolute verity.

"If the court of limited jurisdiction is charged with the ascertainment of jurisdictional facts, and its proceedings show that these facts were ascertained, they can not be denied, because the making of the jurisdiction of the court to depend upon a preliminary fact, implies authority to ascertain that fact."—*Wyatt's Adm'r v. Rambo*, 29 A. R. 524.

The court, in the case cited, proceeds further to say, "The case cited in *Wyatt v. Steele*, (26 A. R.), does not sustain it."—*Brittain v. Kinnard*, 1 Brod. & Bing. 432. (5th C. L. R.)

It really asserts nothing more than that *the ascertainment of jurisdictional facts, by a court of limited jurisdiction, is conclusive.*

"The general principle applicable to cases of this description is perfectly clear. It is established by all the ancient, and recognized by all the modern, authorities, and the principle is, that a conviction by a magistrate who has

Ex parte Selma & Gulf Railroad Company.

jurisdiction over the subject matter is, if no defects appear on the face of it, *conclusive of the facts stated*.”—Dallas, C. J., quoted in *Wyatt & Rambo, supra*, 524.

“The proceedings of the court disclosed the jurisdictional facts, and the question was whether they could be contradicted.”—*Wyatt v. Rambo, supra*, 524.

A court deciding a question within its jurisdiction can never be liable for its decision. While *unreversed it is final and conclusive*.—1 Talk. 396 ; 1 Ld. Raymond, 469 ; *Stuyvesant v. The Mayor*, 7th Cow. 588.

The notice in this case is given under the authority of a special act, having reference to a particular subject, and being a part of the machinery of the law by which to accomplish the end, the express object, that is, “Special Terms of the Court of County Commissioners.”—Revised Code, § 830.

Before the passage of this act, the court of county commissioners could hold no special terms. This was developed by the decision of *Wightman v. Karsner*, at the January term of this court, 1852.

Section 830 of the Revised Code is a special law ; it is very far from apparent that it was the intention of the legislature to repeal it, by the act of Oct. 10, 1868 ; this section was not set out by name and repealed expressly as other sections of the amended act were, which shows that it was not intended to be repealed. To hold a special law repealed by implication, by the passage of a general law, would be contrary to the settled rule of the Supreme Court of Alabama on this subject.—29 Ala. 573.

PECK, C. J.—The return of the court of county commissioners of the county of Dallas to the alternative *mandamus* issued by this court, at a former day of this term, commanding said court to subscribe two hundred and fifty thousand dollars to the capital stock of the Selma & Gulf Railroad Company, and issue the bonds of said county in payment of said capital stock, &c., or that they show cause why said subscription was not made, &c., shows two causes

Ex parte Selma & Gulf Railroad Company.

why said capital stock had not been subscribed according to the mandate of said writ.

1. It shows and states that the proposal of said railroad company to said county of Dallas, to subscribe for and take two hundred and fifty thousand dollars of the capital stock of said company, and pay for the same in the bonds of said county, was made to a special term of said court, on the 28th day of June, 1870, and not to a regular term of said court; and that said special term of said court was not a legal term of said court, held by the direction of the probate judge of said county, upon the notice required by law, and that, therefore, the order of said court to submit said proposal to the qualified electors of said county, for their acceptance or rejection, and the election held under said order, were invalid, and gave to said court no legal authority to subscribe to the capital stock of said railroad company.

2. That the said proposal of said railroad company was not a proposal authorized to be made by the act of the general assembly of this State, entitled "An act to authorize the several counties, towns and cities of the State of Alabama to subscribe to the capital stock of such railroads throughout the State as they might consider most conducive to their respective interests," approved the 31st of December, 1868, (Acts 1869, p. 514.) And that said court of county commissioners, by said proposal, acquired no jurisdiction to make an order submitting said proposal to the qualified electors of said county for their acceptance or rejection; and that said order, and the election held under it, were invalid, and for this reason, also, said court had no authority, and should not be required by the mandate of this court, to subscribe, in behalf of said county, to the capital stock of said railroad company, and issue the bonds of said county in payment of the same.

The said court of county commissioners attach to their return, as an exhibit, and part thereof, a full certified transcript of the proceedings, &c., had in said court, on said proposal of said railroad company to said county of

Ex parte Selma & Gulf Railroad Company.

Dallas for a subscription, &c., including a copy of said proposal.

On the filing of said return, said railroad company appeared in open court, by their attorney, and moved to quash said return, on the ground of its uncertainty and insufficiency, and prayed that a peremptory *mandamus* might be issued, &c.

A return to an alternative *mandamus* may contain several causes or defenses, and if either be sufficient, a peremptory *mandamus* will not be issued.—Moses on Mand. 214; *Wright v. Fawcett*, 4 Burr. 2041.

As the return in this case contains two distinct defenses or justifications on the part of said court of county commissioners, for refusing or declining to subscribe to the capital stock of said railroad company, we will consider them in the order in which they are made.

1st. Was the said special term of said court of county commissioners a lawfully convened and organized special term of said court? The said return states that it was not, and that said court was convened on a notice published in a newspaper called the Selma Times, published in the city of Selma, in said county, and not in the Selma Press, the official organ in and for said county. That the Selma Press was the official organ of said county, duly designated for that purpose by the probate judge of said county, under an act of the general assembly of this State, entitled "An act to regulate the publication of legal and other notices in the State of Alabama," approved October 10, 1868, (Acts 1868, p. 220,) and that the notice published in the Selma Times did not authorize the said court of county commissioners to hold a special term of said court, under said notice, and that said special term of said court was, therefore, held without authority of law, and that all its acts, proceedings and orders were invalid. This objection depends upon the legal effect of the said act of the 10th of October, 1868. Did said act repeal, modify or control section 830 of the Revised Code, authorizing special terms of said court to be held? If it did not, then this objection is without force. Said section 830 is in the

Ex parte Selma & Gulf Railroad Company.

following words, to-wit: "In cases where officers are to be appointed, or vacancies supplied, or any other special duty required by law to be performed, a special term must be held, by direction of the judge of probate, upon ten days notice, by advertisement in some newspaper in the county, or by posting up at the court-house door and two other public places in the county, notice of the same."

This section is clearly a special law, and was not repealed by said act of the 10th of October, 1869, unless it manifestly appears, by said act, that such was the intention of the legislature. A special statute is not repealed, modified or controlled by a subsequent general act on the same subject, unless the latter clearly manifests *on its face* such an intention.—*Mobile & Ohio R. R. Co. v. The State*, 29 Ala. 573.

The act of the 10th of October, 1869, sets out thirty-two sections of the Revised Code requiring notices in the cases named in said sections, respectively, to be published, &c., and says: "All the provisions of the Revised Code, as above set forth, which are in conflict with the provisions of this act, are hereby repealed;" and then enacts that "it shall be the duty of the probate judge of each county in the State to designate a newspaper in which all legal advertisements, notices or publications of any and every character, required by law to be made in his county, shall be published, which paper, so designated, shall be the official organ in and for said county." This language is broad and general, but we think it by no means clearly manifests, on its face, an intention to repeal said section 830 of the Revised Code. If such was the intention of the legislature, why was it not named with the other sections set out in said act, and by name repealed by it? The obvious answer to this question is, that section 830 being a special law, was not intended to be repealed, modified or controlled by said act, and therefore was not set out in it. We therefore hold that the first cause, &c., stated in said return, is insufficient. Besides, the record of said court, as to the organization of said special term, states that due and legal notice had been given by adver-

Ex parte Selma & Gulf Railroad Company.

tisement, for ten days, in a newspaper published in Dallas county. The said section 830 of the Revised Code not being repealed, this entry of record shows a strict compliance with its provisions as to the notice required to be given in such cases, and shows that said special term was convened on proper notice, for that purpose, and was a legal special term of said court.

2d. The second cause shown in said return is, that the proposal of said railroad company, made to said court of county commissioners for a county subscription, &c., was not a proposal authorized to be made by said act of the 31st December, 1868, and that said court, by said proposal, acquired no jurisdiction to make an order submitting said proposal to the qualified electors of said county for their acceptance or rejection, and that the order of said court, and the election held under it, were invalid, and gave to said court no authority, in behalf of said county, to subscribe to the capital stock of said railroad company, and to issue the bonds of said county in payment of the same.

The said proposal is set out in said return.

The court of county commissioners is a court of special and limited jurisdiction, and can exercise such powers only as it is specially authorized to exercise, and these powers must be exercised in the mode and manner and in the cases specified.—*Wright v. Karsner*, 20 Ala. 446.

In the case of *Trammell et al. v. Pennington et al.*, at this term, we decided that the only authority of a county to subscribe to the capital stock of railroad companies was a special statutory authority, and being a special authority, it must be strictly pursued. So we decide now. The people are permitted, under said act of the 31st December, 1868, to vote for a county to subscribe to the capital stock of a railroad company to build a railroad, and that the bonds of the county may be issued to pay for said stock; but the statute gives no authority to the people to vote for a county to subscribe to the capital stock of a railroad company for the purpose of building a passenger and wagon bridge across a river, to be free of toll to all the people of

Ex parte Selma & Gulf Railroad Company.

the State. The proposal of a railroad company authorized by the statute, to a county, to subscribe to the capital stock of such company, is manifestly confined to a subscription to build a railroad. The statute gives no authority to add to the proposal something else as a make-weight to catch the people, and to induce and influence them to vote for a proposition containing two objects, one to build a railroad, and the other to build a passenger and wagon bridge across the river, or any other enterprise not connected with the building of a railroad. If that can be done, who can tell which of the two objects had the greater weight with the people to induce them to vote for subscription—the building of the railroad, or the building of the bridge? Who can tell, in any given case, if the proposal had been to build a railroad merely, the people would have voted for subscription at all? It can not be told. In this case, the proposal contains two distinct propositions, the one lawful, the other unlawful. The said railroad company joined the two together in their proposal, and they can not now be separated. The whole proposal, therefore, is unlawful, and must be so declared. It is insisted by the said railroad company, that the proposal to build said bridge was for the benefit of said county. That may be so, but if admitted, it does not avoid the objection. The gist of the objection is, that the county had no authority to vote a subscription to the capital stock of said railroad company to build, or to help to build, a passenger and wagon bridge across said river, free of toll to all the people of the State. The statute only authorizes a county to vote a subscription to the capital stock of a railroad company to build a railroad, and nothing else. And furthermore, adding to said proposal the proposition to build a bridge across said river free of toll, &c., had a direct tendency, and such was no doubt its purpose, to prevent an unbiased and impartial election on the single and only question that the statute authorizes to be submitted to the suffrages of the people. For these reasons, we decide that said proposal was not such a proposal as the said act of the 31st December, 1868, permitted or authorized

Ex parte Selma & Gulf Railroad Company.

the said railroad company to make, and that the said commissioners court, by said proposal, acquired no jurisdiction, by virtue of said act, to make an order to submit said proposal to the qualified electors of said county for their acceptance or rejection; and that said order, and the election held under it, were invalid, and conferred on said court no authority to subscribe to the capital stock of said company and issue the bonds of said county in payment of the same, for the purposes stated in said proposal. Consequently, the application for a peremptory *mandamus* must be denied, and the said Selma & Gulf Railroad Company will pay the costs, &c.

[NOTE BY REPORTER.—At a subsequent day of the term, the petitioner, the Selma & Gulf Railroad Company, applied for a re-hearing, and filed in support thereof an elaborate written argument, the main points of which are given below.]

ALEXANDER WHITE, in support of the petition, argued as follows:

It is admitted in the opinion, that if the application had not contained the proposal about the foot bridge, the *mandamus* would be allowed.

It is in the nature of right, that a party having the right may concede it *in whole or in part*. A right claimed or held under a special authority, can not be *extended or enlarged* by the party claiming under it; but it can be conceded, or it may be modified, provided the *modification* is clearly within the limit of the right.

The limitations which are put upon the railroad companies in this act, are, that the companies shall receive the bonds of the county for stock *at par*, and *not* any limitation as to the right of the companies to the bonds, or to the absolute control and use of them. There is nothing in the act which *requires* the company to use the proceeds of the bonds in the building of the railroad. It is implied, perhaps, that this should be done, and doubtless it would be in most, if not all cases; but it is *no term* of the con-

Ex parte Selma & Gulf Railroad Company.

tract, no more than in the case of the railroad company receiving pay for stock from a private individual. The money, when paid, becomes the property of the company absolutely, and there is no contract on its part to appropriate it in any *specific* manner. It belongs to the company, and the company can do with it what, in its discretion, it thinks proper to do.

This principle, and the application of it, is recognized in the opinion in this case. Thus far the proposition is connected with the bonds of the county and the *appropriation of them* to the building of the *railroad bridge*. *That is the purpose* to which they were to be applied. To that extent the railroad company limited its right to the use of the bonds of the county, by designating the use and binding itself to that special appropriation of *the bonds—all the bonds, not a part of them*.

Here, then, is a proposal, authorized by the act of 31st of December, 1868, to the county of Dallas, made in regular form, voted upon and accepted by a large majority of the people, in accordance with the provisions of said act. It is, then, valid and legal, unless *rendered* invalid and illegal by something else in the proceedings.

Next follows a proposal by the railroad company to build *in connection with the railroad bridge*, a wagon and passenger bridge. This is a separate thing, *connected with*, but *no part* of the railroad bridge. *The people* of the county have *no part* in building this bridge, and no part in *contributing the means* necessary to building it.

The two propositions are kept distinct. That to which the county is asked to subscribe, and for which its bonds are to be given, is *the railroad bridge*.

The language is, "respectfully propose to the county of Dallas to take two hundred and fifty thousand dollars in the capital stock of said company—to be expended in the construction of a railroad bridge across the Alabama river."

The county was not asked to vote stock in the railroad company to build a wagon bridge, nor was it asked to con-

Ex parte Selma & Gulf Railroad Company.

tribute in any way whatever for the building the wagon and passenger bridge. Such a thing was never thought of or intended by the railroad company.

The proposal of the railroad company was to build the wagon and passenger bridge out of its own means, independent of the subscription of stock in the railroad company, and as inducement to the people to vote the stock in the company, the company proposed to build the wagon bridge, not out of funds gotten from the county, for these were to be expended in the construction of the railroad bridge, but out of independent funds. The way of it is this: In the construction of a railroad bridge, the abutments, pillars and most of the other material needed for the railroad bridge can be utilized in building a wagon and passenger bridge, without interfering with the use of the bridge for railroad purposes. Hence, the expense of building such a bridge in connection with a railroad bridge, is very small comparatively, and the railroad company were willing to build this bridge if the county would aid them in building the railroad bridge.

The distinct proposition to the county, was to take so much stock in the company, to be paid for in the bonds of the county, to be expended in building a railroad bridge.

There was no proposal to subscribe stock, &c., to be used in building a wagon and passenger bridge.

Reason and right require that the railroad company be allowed to stand upon the terms of its petition. It asks for the bonds to be expended in the construction of the railroad bridge.

This being so, the people could not and did not understand that they were voting stock in the railroad company to build a wagon bridge.

The language was explicit, and it was so understood by every one who took the trouble to try to find out.

The proposition submitted to the people of the county was to take so much stock in the Selma and Gulf Railroad Company, to be paid for in bonds of the county at par.

The amount thus proposed to be subscribed, was to be

Ex parte Selma & Gulf Railroad Company.

expended in the building of a railroad bridge, which, it is submitted, was legitimate.

The purpose, then, for which the county was asked to contribute, was authorized by the act of December 31st, 1868, and to this extent the proceeding is valid.

The other proposal is this: "The undersigned further propose in behalf of said Selma & Gulf Railroad Company, that in connection with said railroad bridge, that said company will build a passenger and wagon bridge across the Alabama river." It is not proposed to build said passenger and wagon bridge out of the proceeds of the bonds of the county, or by the help of the county, but it was this, and no more: If you will subscribe \$250,000 to stock in the railroad company, the railroad company will expend it in the building of a railroad bridge, and will also build in connection with the railroad bridge, a passenger and wagon bridge. By the law, all that the county could get for its subscription was stock in the railroad company. It can scarcely be maintained that the contract would be vitiated by the railroad company giving it the stock, and building a bridge which would be beneficial to the county and the State.

The misapprehension, I respectfully submit, in the mind of the court is, that the proposition of the railroad company to build the wagon and passenger bridge, was to build it out of funds furnished by the county; that it was, in other words, a proposal to the county to furnish bonds for stock in the company to build the wagon and passenger bridge. That such is not the fact, will be seen by reading and comparing the two propositions. The design of the company was to separate the two propositions and make them, as they are, distinct; the one embracing specifically the appropriation of the proceeds of the county subscription to the railroad bridge, and the other being an additional undertaking by the railroad company, not out of funds obtained from the county, but from its other resources.

The proceeds of the bonds of the county are to be expended in the building of a railroad bridge. Now, if

Ex parte Selma & Gulf Railroad Company.

they are expended in the building of a railroad bridge, how can they be used in the building of a wagon bridge? And, in proposing to build the wagon bridge, the railroad company does not propose to build it of the proceeds of the county bonds. Can it be assumed that it does, in the absence of any proposition to do so, and in the face of a proposition to expend the proceeds of the bonds in the building of a railroad bridge?

It is said, in the opinion of the court, that this proposition was unlawful, because it proposed a county subscription to a railroad company to build a common bridge. I have endeavored to show, and think I have shown, that this is a misconception of the proposal of the railroad company. It certainly does not say so in terms; it certainly does say that the proceeds of the county subscription are to be expended upon the railroad bridge.

The rule requiring a strict construction of acts of the kind of that of 31st December, 1868, or the rule that the intendments are against courts of limited jurisdiction, do not imply a spirit of hostility to such acts, or to such courts, but only that they are special grants of power; that the power is not presumed, but must be shown; but in each case it is law which confers the power, and its sanction is as emphatic within the purposes of a special law and the jurisdiction of a limited tribunal, as in any general jurisdiction.

The meaning of language, the purport of statements or recitals, are to be tested by those rules which are established by law as guides in interpretation and construction.

The petition of the railroad company embraces two several propositions, distinct in subject matter and separate in form, as already stated.

The proposal of the railroad company is not that the county shall subscribe stock in the railroad company to build a wagon bridge—and thereupon it is not objectionable on that ground.

Is it illegal upon any other ground? If so, it must be because it is prohibited by law, contrary to public policy, or vicious and immoral in itself; for these embrace all the

grounds upon which, in a general aspect, an act can be denounced illegal.

The proposal to build the wagon and passenger bridge was by the railroad company, to be built by it, and not by the county. Now, if the people of the county had confidence in this offer of the railroad company that they would comply with this proposal, I submit whether it was not a legitimate subject for their consideration in determining whether they would vote for the subscription. It did no violence to the act under which this proceeding was authorized. It did not propose that the county should subscribe for the purpose of building this wagon bridge. The act of 31st December, 1868, does not prohibit the railroad company from presenting any and every lawful inducement to the people to vote for the subscription.

The offer of the railroad company to build the wagon bridge was simply an inducement to them to vote for the subscription to the railroad bridge, and was not a proposal to the county to build the wagon bridge, or to aid in any way whatever with its bonds in the building of the wagon bridge.

The act of December 31st, 1868, prescribes the things to be done (in cases of this kind) and the manner of doing them. It does not limit the railroad company in the legitimate inducements which it may offer to the people to vote for the subscription, nor to the manner in which it shall present those inducements; on the contrary, it contemplates reasonably the presentation of the whole question to the people, and leaves the decision to them. And in reviewing their action the law does not regard the people as incompetent, as easily gulled or deceived.

If, then, the proposition which was submitted to the vote of the people of the county to take \$250,000 in stock in the Selma & Gulf Railroad Company, was authorized by the act of 31st December, 1868, and in form and substance was good, as is decided by this court, then the \$250,000 bonds is to be expended in the building of a railroad bridge, and there was no contribution to be made or pro-

Ex parte Selma & Gulf Railroad Company.

posed to be made by the county to build the wagon and passenger bridge.

This proposal of the railroad company, then, stands as an unnecessary and gratuitous offer by the company to build the wagon bridge. Does it operate back upon the proposal submitted to the county, proper in itself and in proper form, and complete in this respect, so as to invalidate it?

I have called the attention of the court to the features of that proposal, that it was not illegal, contrary to public policy, immoral or vicious in any sense or degree.

It does not conflict with the other proposition, neither does it add to or diminish the burthens or liabilities of the county in any way whatever, nor impair its rights under the proposed subscription. It is all good and beneficial so far as the county and the people are concerned, and casts no burthen upon any one except the railroad company, which does not seek to avoid the burthen.

The act of 31st December, 1868, having invested the county with the power to take stock in railroad companies, and the proposition having been made to the county of Dallas in conformity with the act, to take \$250,000 in stock, and pay for the same in bonds, the proceeds of which were to be expended in the construction of a railroad bridge, and the proposition having been voted upon and accepted by the people of the county, it becomes a contract. It has parties competent to contract; a subject matter of contract, and an agreement between these parties relating to that subject matter.

Now, the proposal to build the wagon bridge was either valid or invalid. If invalid, it was superfluous, and could not affect the terms of a contract complete in itself and legal and binding upon both the parties to it, the railroad company and the county of Dallas. If valid, it was only binding in accordance with its terms, and in consonance with the other proposition, which obligate the railroad company to build the wagon and passenger bridge, and that without the use of any of the proceeds of the county subscription, which by the terms of the railroad company's

proposal were to be expended in the construction of the railroad bridge.

"A form was prescribed by the charter of a railroad company in which subscription to stock should be taken, and it was further provided that the company should have all the powers incident to a corporation at common law.

"A subscription followed the language of the form, and contained additional stipulations not inconsistent with those prescribed by the form, which would have been competent at common law for the parties to make. *Held*, that the subscription was valid."—*Fisher v. Evansville & Crawfordsville R. R. Co.*, 7th Ind. 407.

The proceeds of these bonds were to be expended in the building of a railroad bridge across the Alabama river at Selma. This was a part of the railroad in Dallas county, and is ruled by the court to be proper and legitimate.

A railroad subscription is a contract which the railroad company may enforce against the party subscribing the stock.—29 Ala. R. 651; 5 Ala. R. 587; Ang. & Ames on Corp. § 517; 8 Ala. R. 586.

The proposal, and the one to which alone the vote of the people had any reference, when accepted, was a legal contract by Dallas county to take 2,500 shares of stock in the railroad company.

This of itself, is unquestionably good because it is literally the thing which was authorized by the general assembly, and being *prima facie* legal and valid, it must remain of force unless it was vitiated and rendered of no effect, by some other thing done by the parties. It is the declared will of the people of Dallas county. They have expressed in the most unequivocal manner their desire to subscribe for 2,500 shares of stock in the Selma & Gulf Railroad Company, and this will, it is the duty and doubtless the desire of the court to carry into effect, unless some insuperable obstacle intervene.

The only thing which it is said invalidates this act of the people of Dallas county is, that the railroad company, at the time of proposing to the court of county commissioners that the county of Dallas should take 2,500 shares of stock

Ex parte Selma & Gulf Railroad Company.

in the company, also proposed to build a wagon and passenger bridge across the Alabama river in connection with the railroad bridge. It will be borne in mind that the county subscription by the express terms of the *proposal* to the county, was to be *expended in the building of the railroad bridge*; that this proposal was distinct and complete in itself; that it was capable of being carried out by both parties without any reference to the other proposal of the railroad company.

The county could make the subscription of stock in the company and pay for it in bonds, and the company could build the *railroad bridge* exclusive and independent of (entirely separate from) anything to be done or not done in reference to the *wagon bridge*. I do not admit that the proposal to build the wagon bridge was in any way, manner or degree illegal or immoral, "*malum prohibitum*" or "*malum in se*," but taking it in the strongest sense against the railroad company, I propose to show that according to well established principles of law that if illegal it would not vitiate the proposal to the county to take stock in the company, and would not defeat the will of the people as expressed by their vote.

"Whenever the contract which a party seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect, and the test, as to whether a demand connected with an illegal transaction is capable of being enforced at law is, whether the plaintiff requires to rely on such transaction in order to establish his case?" Chitty on Contracts, title, Illegal Contracts, chapter iv. 569, and cases cited; 1 Carnes, 104; 6 Ohio, 21, 11 Serg. & R. 164; 4 Pick. 314; 11 Wheat. 258; 7 Taunt. 246; *Gunter v. Leckey*, 30 Ala. R. 595.

In this case the railroad company would be entitled to recover upon the proof that the proposal to the county of Dallas had been made through the court of county commissioners to take 2,500 shares of the capital stock of the company, and pay for the same in bonds of the county at par, and that said proposal had been submitted to the

Ex parte Selma & Gulf Railroad Company.

people of the county at an election, &c., and that a majority of the people had voted in favor of the subscription. These facts all appear upon the record in this case; and upon the proof of these facts the railroad company, if it were a plaintiff at law suing upon the subscription, would be entitled to recover. It would not be necessary, nor would it even be relevant, for it to introduce proof of the proposal of the railroad company to build the wagon bridge. The proposal to give its stock for the bonds of the county was, when accepted, a sufficient consideration (and the specific consideration) designated by the act of 31st December, 1868, to sustain the contract, and all the proof needed would have been embraced in this proposal. It would not then be necessary for the railroad company to have introduced any proof about or of the offer to build the wagon bridge. It could recover without such proof, and according to the test laid down by Mr. Chitty and recognized by this court as well as others, as quoted above, the railroad company, to make out its case not having to rely on this proof, the proposal to build the wagon bridge, does not affect the validity of the proposal to take stock in the company.

The building of a wagon and passenger bridge in connection with a railroad bridge across the Alabama river, does not violate public policy or morality, nor does it contravene any prohibition of any statute.

It, then, cannot be, and is not illegal. The most that can be said of it and against it is, that the act of 31st Dec. 1868, gave no authority to make a proposition in connection with the proposal to the county to take stock in the railroad company, and being without authority of law it is void.

This is the most that can be urged against it. There is certainly nothing immoral in it, and contracts are not void on the ground of "public policy, unless they expressly and unquestionably contravene public policy, and be manifestly injurious to the interests of the State."—Chitty on Contracts, 575, title, Illegal Contracts.

The presumption of law is in favor of the legality of a

Ex parte Selma & Gulf Railroad Company.

contract—and, therefore, if it be reasonably susceptible of two meanings, one legal and the other not, that interpretation shall be put upon it which will support and give it operation. Illegality of consideration shall not be inferred. Chitty on Contracts, 572; 1 B. & Ald. 471; 2 Starkie, 107; 3 East, 192.

There is no statute which prohibits the building of a wagon bridge across the Alabama river, nor would the building of such a bridge “expressly and unquestionably contravene public policy and be injurious to the interests of the State.” On the contrary, building such a bridge would be beneficial to the interests of the community and the State.

It is said that it was without authority of law to propose to build it out of the proceeds of the bonds given by the county to the railroad company, or to propose to the people to vote bonds to the railroad company to build it. I answer to this, that no such proposition was made to the people of Dallas county; they had nothing to do with the expenditure of the company’s money, not derived from their subscription; there was no need to ask their consent.

Under this state of facts and guided by these rules of law, which will meet with the ready assent of the court, I recur to the position that, at the most, this proposal to build a wagon and passenger bridge could only be void, because it was not authorized by the act of Dec. 31, 1868.

The first proposition is legal; it is in strict accordance with the act of the general assembly, “a proposition by a railroad company building a railroad in the county, to the county, to subscribe a certain amount of stock in the railroad company and to pay for the stock in the county bonds at par.”

The other is beyond the act and without its authority, and so far as it depends upon the said act of 1868 for its validity, is void.

The consideration of the former is the stock in the railroad company, on the part of the railroad company, and the county bonds on the part of the county.

The consideration of the latter was only the proposal of

the railroad company, without any corresponding equivalent or promise by the county.

This latter being regarded as beyond the authority of the act, the question presents itself, What is its legal effect upon the other proposition? The maxim of law "applicable to every sort of writing by which legal rights are created or transferred," is "*ut res magis valeat quam pereat.*" In the Earl of Clanricard's case, Hob. R. 227, Lord Chief Justice Hobart says, "I do exceedingly commend the judges who are cunning and almost subtle to invent reasons and means to make acts according to the just intent of the parties, and avoid wrong and injury which by rigid rules may be wrought out of the act" quoted and approved by Lord Ch. J. Hale in *Crossing v. Scudamore*, 1 Vent. 141; by Willes, Ch. J., in *Roe ex dem. v. Transmarr*, (Willes' R. 682; 2 Wils. 75, 78).

Justice Cowen, in *Darling v. Rogers*, 22d Wend. 490, quoting Ch. J. Gibbs, says, "The truth is, there is no difference between a transaction illegal at common law and by statute, and the objection being that this deed conveys property in a way that is prohibited, whether by common law or the statute, the construction is the same. Taking it to go no further than as I now state, it follows that, that which conveys illegally is void, and that which conveys legally is valid." A statute, when it prohibits a thing, may go farther and say "that the deed by which the thing is done is void," and then a court of law must declare it void to all intents and purposes, because the legislature has said so."

If a statute does not declare that contracts made in violation of its provisions shall be wholly void, then, if the good part be separable from and not dependent on the bad, that part only will be void which contravenes the provisions of the statute.—1 Mod. 35; 1 Vent. 237; 3 Taunt. 244; 2 Wils. 351; 3 Taunt. 727; Chitty on Contracts, 597, 598.

"We have already seen that whenever there are two considerations, and one of them be unlawful, the promise is void; but if one of them be only void the other will support a promise."

"The reason of this distinction is, that inasmuch as the entire consideration forms the basis of every portion of the promise in the one case, if a part of the consideration is illegal it vitiates the whole, while if a part be merely void it has no legal effect, being mere surplusage. When, therefore, the contract is severable, and there are different acts to be done, some of which are void and others are binding, the agreement may be treated as if it were composed of several distinct contracts with the same consideration, and enforced as far as it is lawful and rejected as to the residue."—Story on Contracts, ch. xix, 655, § 622; Addison on Contracts, 147; *Patton, Governor, &c., v. Gilmer and others*, 42 Ala. R. 555.

In the case under consideration the Selma & Gulf Railroad Company, engaged in the construction of a railroad in the county of Dallas, applied by its president and a majority of its directors, in writing, to the court of county commissioners of Dallas county, submitting proposals to the county to take \$250,000 of stock in the railroad company and pay for the same in bonds of the county, to be expended in building a railroad bridge across the Alabama river at Selma.

Now this is literally and precisely the thing authorized by the act to be done—done by the parties and in the manner expressly authorized by the act, there is nothing wanting and no departure from the act, except in proposing to expend the bonds in building a railroad bridge, which it is decided does not vitiate.

This is a separate and independent proposal, complete of itself, and it is either legal or illegal, valid or invalid.

It is authorized by and has the express sanction of the law. The parties, the subject matter, the mode of procedure, the court before whom it is to be inaugurated, all are in strict conformity to the act of 31st of December, 1868. Under this act and on a procedure of this kind, the county receives stock in the railroad company, and the railroad company receive the bonds of the county. These are the mutual considerations fixed by the act itself which bind the parties and make the contract valid between them.

This proposal, in strict conformity to the provisions of the act, was submitted to the people of Dallas county at an election after the proper notice, and was accepted by them.

The proposal which was thus accepted by the people of Dallas was to subscribe \$250,000 stock in the railroad company, and pay for it in county bonds to be expended in building a railroad bridge across the Alabama river at Selma, and when accepted by the people it became a contract which bound both the parties to it, according to its terms.

This is so obvious that language cannot elucidate or argument enforce it.

The other proposal is, that the railroad company propose to build, in connection with the railroad bridge, a wagon and passenger bridge, free to all the people of the State.

This is a separate proposition from the other, not made in terms dependent upon the other, nor proposed to be built out of the funds furnished by the county. This may be stricken out and the other remains complete and entire of itself, and in full conformity with the provisions of the act.

This last proposal is not prohibited by the act of 31st of December, 1868. There is no provision in that act prohibiting the insertion of such a proposal in connection with the proposal authorized by the act. There is nothing in the act declaring that if any thing *more* than is expressly authorized by the terms of the act is engrafted upon, be attached to the authorized proposal, that either the addition shall be void or that the whole proceeding shall be void. The act is *silent* on this point, and therefore this last proposition is not made unlawful or even void by the act of December 1st, 1868.

Any implied restrictions or limitations grow out of the want of authority, and do not spring from any prohibition in the act. It is equally clear that the proposition to build the wagon and passenger bridge is not immoral, against public policy, or in violation of any other statute.

It is, then, reduced to this—that the proposal is, at most,

Ex parte Selma & Gulf Railroad Company.

simply void—not unlawful or illegal, but void—because by the act which conferred the power to institute this procedure, there was no power given to the railroad company to make such a proposition, and no power given to the commissioners court to submit such a proposal to the people, and no power given to the people to accept such proposal when made.

The two propositions are several, and are separated in the form in which they are presented.

A thing which is void is ineffectual, to do or to undo. It has no power to preserve or to destroy, to cure or to kill. It is nothing. It is, to use the language of Mr. Story, quoted above, “mere surplusage.” A statute which has been declared unconstitutional and void, is as though it never had any existence, and so of any act of any person or court.

When a statute is declared unconstitutional, it is as though it had never been—and what is true of an act void in toto, is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force.—Cooley on Constit. Lim. 188; 5 Ind. 348; 3 McLean, 107.

The case, then, may be thus stated: Two proposals are submitted to the people of Dallas county, one of them legal and valid, distinct and entire in itself, by which the people are asked to subscribe to the railroad company a certain amount to be expended in the building a railroad bridge. This was exclusively the use to which the bonds of the county were to be appropriated.

The other was a proposal by the railroad company to build in connection with the railroad bridge a wagon and passenger bridge, which proposal, for want of authority in the party to make it, is void.

This proposal, being void, is a nullity. It is as though it had never been, and may be stricken out, and the case stands alone upon the first proposal.

It is said that this last proposal, though void, had its effect doubtless upon the popular vote, and therefore it is

Ex parte Selma & Gulf Railroad Company.

impossible to say whether the people would have voted in favor of the first proposition had they known that the *second was void*. With great deference and sincere respect for the court, and the distinguished member of the court who proposed this position, I submit the following criticism and argument to show, not so much an error in logic as a misapprehension of the facts. That argument and conclusion of the court is *based* upon the assumption that the people of Dallas county were asked to vote a subscription of stock to the railroad company to build a wagon bridge. This I have shown is a misapprehension. Such was not the fact, as shown by the *language* of the proposal itself.

The proposal to build a wagon bridge being without authority of law, and therefore void, does not vitiate the contract, because being void it is a nullity and is to be regarded as though it had never been. It may be stricken out, and it leaves the contract perfect, legal and complete in all its parts, and in its entirety between the railroad company and the county of Dallas.

When it is said that the second proposal entered into the minds of the people at the election and influenced their vote, the answer is that the same thing may be said of every contract which contains terms, some of which are legal and valid, and others which are void. In every case the terms of the contract which are valid had probably an influence in inducing the making of the contract, yet the rule is well settled, as I have shown by authorities cited in this argument, that parts of a contract, some of which are legal and others void, will be enforced if capable of severance from those which are void.

Both of the maxims, "*Ut res magis valeat quam pereat*," "*Utile per inutile non vitiatur*," must be ignored before the conclusion can be sustained that the legal and valid contract contained in the first proposition is vitiated by the void proposal contained in the second.

If a corporation makes a contract valid in part and invalid as to the residue, for want of power in the corporation to make the entire contract, the contract will be valid to the extent of the power and void only as to the excess.--8 Smedes

Ex parte Selma & Gulf Railroad Company.

& Mar. 151 ; 7 How. (Miss.) 508 ; 2 Ala. R. 457, 485, 486 ; 10 Peters, 453.

In reference to questions of this sort, corporations and natural persons stand upon the same footing.—*Patton, Gov. v. Gilmer*, 42 Ala. R. 554.

“Every man must be charged at his peril, with a knowledge of the law. There is no other principle that is safe or practicable in the common intercourse of mankind.” Kent, Ch., *Lyon v. Richmond*, 2 I. C. 60.

This rule, applicable to individuals, must apply with equal force to a community ; and the proposition to build the wagon and passenger bridge being void, and every one being chargeable with a knowledge of the fact, it could exert no influence upon the election which the law or court can recognize, much less rest its judgment upon.

The following response was made by—

PECK, C. J.—I have carefully reviewed the opinion in this case, in connection with the argument of the learned counsel of the petitioner for a re-hearing. The argument is able and ingenious, I will not say subtle, though it comes very near it ; but it is not satisfactory. Instead of convincing me the opinion is wrong, it has the rather confirmed me that it is right.

The counsel labors skillfully to show that the proposal of the said railroad company, to-wit, the proposal to build, in connection with the railroad bridge, a passenger and wagon bridge across the Alabama river, to be free of toll to all the people of the State of Alabama, is a separate thing, connected with, but no part of, the proposal to build the railroad bridge ; that the people of the county have no part in building the passenger and wagon bridge, and no part in contributing the means necessary to build it ; that the two propositions are kept distinct ; that to which the county is asked to subscribe, and for which its bonds were to be given, was the railroad bridge ; that the county was not asked to vote stock to build the passenger and wagon bridge, nor was it asked to contribute, in any way whatever, for the building of the passenger and wagon bridge.

But the counsel concedes that the proposal of the said company to build the passenger and wagon bridge was intended as an inducement to the people to vote to subscribe \$250,000 to the capital stock of said company to build the railroad bridge; yet he insists the proposal to build the passenger and wagon bridge was not illegal, contrary to public policy, immoral, or vicious, in any sense or degree. This, I think, a little reflection will show, is much easier said than proved.

It is, undoubtedly, lawful for a railroad company to make the proposal named in the statute, but to add to, or connect with such proposal, anything that is intended to induce and beguile the people to vote for such proposal, is, in my poor judgment, not only illegal, contrary to public policy, immoral and vicious, but with all, dishonest. The purpose of the said company in making the proposal to build the passenger and wagon bridge being to induce the people to vote to subscribe to the capital stock of the company, it is fair and legitimate to presume the said purpose was accomplished, and that the people would not have voted to subscribe to the capital stock of said company if this proposal to build the passenger and wagon bridge had not been made, and that they did so vote because of the said proposal of said company to build said passenger and wagon bridge. Now, I beg leave to ask the learned counsel, did or does this proposal of said company to build said passenger and wagon bridge (the vote of the people being for subscription to the capital stock of said company, induced thereto by said proposal,) impose any legal obligation on said company to build said passenger and wagon bridge,—any obligation that could or can be enforced by a court of justice? The counsel will hardly venture to answer this question in the affirmative. If no such obligation exists, then it is very certain the vote of the people for subscription was obtained by false and delusive inducements made to them by said company; in other words, the vote of the people for subscription was obtained by deceit and fraud, in law, if not in fact. It

Ex parte Selma & Gulf Railroad Company.

may, perhaps, be thought these are plain words, plainly spoken ; and so they are, but plain words, plainly spoken, are always proper and becoming to a court of justice.

It is said, however, " there is no law which prohibits the railroad company from proposing to build a wagon bridge, nor any law which would prohibit it from building the bridge." This railroad company is a corporation, and as a corporation it can only lawfully do such acts as it is authorized to do by its charter, and such acts as are or may be necessary and proper to accomplish and carry into effect the objects and purposes of its creation. The building of passenger and wagon bridges, to be free of toll to all the people of the State, are not such acts as the charter authorizes it to do, nor are they necessary and proper to accomplish the objects and purposes for which it was created. It is, therefore, unlawful for it to engage in the building of such bridges, although not, in so many words, prohibited from doing so, either in its charter or some other law. Furthermore, it is not only not authorized to build such bridges, but it has not the means to build such bridges. All it possesses, or can lawfully possess, as a corporation, belongs to its stockholders, and its president and directors are merely the officers and agents of the stockholders, and bound to employ and use the means and funds of the company in the legitimate business of the company, and if they were to propose and attempt to use them in building free bridges for the use of the people of the State, on the application of one or more of the stockholders a court of equity would enjoin them from doing so.

It was, therefore, not only unlawful because unauthorized, for the president and directors of said company to make the proposal to build said passenger and wagon bridge, but it was also a proposal that they could not lawfully comply with, if even they had the will to do so. If they had not the legal power, and could not comply with said proposal, as it is very certain they could not without a breach of duty and good faith to the stockholders of said company, and without usurping powers not conferred on said company by its charter—all which said president and

directors knew, or are presumed to have known; then, to say the least of it, it was disingenuous to make such proposal to the people for the purposes admitted, to-wit, to induce them to vote subscription, &c., which they would not have done without being moved thereto by said delusive inducement.

Without consuming more time in the consideration of this subject, it is sufficient to say we remain satisfied with the decision already made, and therefore deny the application for a re-hearing. The petitioner will pay the costs of this application.

MOBILE & GIRARD RAILROAD CO. vs. EDWARDS.

[ACTION FOR DAMAGES FOR BREACH OF INDEPENDENT AGREEMENT.]

1. *Evidence; what inadmissible as.*—A written agreement, the foundation of an action for damages, made in the year 1863, and unstamped, is inadmissible as evidence.
2. *Same, instrument made in 1863; how only can be stamped.*—Such an instrument can only be stamped, since the 1st day of January, 1867, by the revenue collector of the proper district.
3. *Same, terms of such unstamped agreement; can not be proved by parol evidence.*—Where the written instrument which is the foundation of the suit is unstamped, and excluded as evidence for that reason, the contract evidenced by such written instrument can not be proved by oral evidence.

APPEAL from Circuit Court of Henry.

Tried before Hon. J. McCaleb Wiley.

THE appellant having brought an action against the appellee to recover damages for the breach of an agreement to deliver certain bacon, &c., introduced as evidence the written contract for the delivery of said bacon, made by appellee in 1863, when the court, on motion of appellee, excluded the instrument from the consideration of the

jury, because it had no United States internal revenue stamp affixed thereto.

The appellant then offered to affix and cancel, in open court, the proper amount of United States internal revenue stamps upon said instrument, and the court refused to permit this done.

The appellant then offered a witness to prove the contract made by appellee in regard to the delivery of the bacon, but the court, on its being made known that the contract which the witness proposed to prove and that set out in the written instrument were the same, refused to allow said witness to be introduced.

To each of said rulings appellant excepted, and took a non-suit, &c.

The various rulings of the court excepted to are now assigned as error.

W. C. OATES, for appellant.

F. M. WOOD, *contra*.

B. F. SAFFOLD, J.—A written agreement, the foundation of an action for damages for a breach of it, made in 1863, and unstamped, is not admissible in evidence. Nor can a party having an interest in it affix the stamp since the 1st day of January, 1867. This must be done by the collector of the revenue of the proper district. It is not void for being unstamped, unless the omission of the stamp was in fraud of the revenue laws.—U. S. Stat. at Large, 39th Congress, 143, § 9.

The refusal of the court to allow the plaintiff to prove the terms of the agreement by a witness, was correct. The general rule that oral evidence can not be substituted for any written conveyance or contract, applies with full force in this case.—1 Phil. Ev. 576, and note 167.

The judgment is affirmed.

STONE & MATTHEWS *vs.* GAZZAM.

[ACTION FOR DAMAGES FOR NEGLECT OF REPAIRS OF STEAMBOAT, &C., BOUGHT BY MARRIED WOMEN, WHO DERIVED TITLE TO THE BOAT BY PURCHASE FROM THEIR HUSBANDS.]

1. *Separate estate of married woman ; of what consists.*—Under the laws of this State, *all* the property of a married woman is her separate estate, if it has accrued to her since the adoption of the Code of Alabama.
2. *Same ; what deed is not void, and can not be assailed by stranger.*—The deed of a husband, made in this State since the adoption of the Code of Alabama, to the wife, on a valuable consideration paid by her to him, by which he conveys to her his interest in a steamboat and its equipments in this State, if free from fraud, is not void. Such a deed, if voidable, can only be avoided by the parties to it, or their creditors, and not by a stranger.
3. *Same ; possession of steamboat under such deed ; what contract will authorize wife to make, and sue on in her own name.*—The possession derived from such a deed will authorize the wife to use the boat in the business of transportation on the navigable waters of this State, and to enter into a contract for the repairs of its machinery, and upon a breach of a contract for such repairs, she may bring an action for damages on such contract in her own name as owner of the boat.

APPEAL from Circuit Court of Mobile.

Tried before Hon. C. W. RAPIER.

The facts are sufficiently stated in the opinion.

LYMAN GIBBONS, for appellant.—It is admitted that a deed from the husband to the wife is void at common law. But it is not so in equity. On the contrary, a conveyance by the husband to the wife, whether by deed or by parol, and whether by way of gift or voluntary settlement, and whether supported by a consideration or not, where no question arises as to creditors or subsequent purchasers, and where the husband is affirming the gift, will always be supported in equity.—Rosser on Husb. and Wife, vol. 1, marg. p. 306–310 ; *ib.* vol. 2, 133–140 ; 2 Kent, 163 ; Story

Eq. § 1380 ; *Stannug v. Styles*, 3 P. Will. 337 ; *Shepard v. Shepard*, 7 Johns. Ch. 57.

In all such cases, the wife at common law has an equitable estate, which will be supported only in equity. But it will be supported there.

2. Now the question arises, what effect has our statute on such estates, and on such deeds?

The sections of the Code to which I refer are as follows : Sec. 2371.—“ All property of the wife held by her previous to the marriage, or which she may become entitled to after marriage in any manner, is the separate estate of the wife, and is not subject to the payment of the debts of the husband.” Sec. 2388.—“ The provisions of this article take effect and are operative on the estates of all married women who have been married, or have received property by descent, gift, or *otherwise*, since the first day of March, 1848.” Also, section 2383.—“ The separate estate of a married woman, acquired subsequently to the first of March, 1848, from and after the time this Code goes into operation, is subject to all the rules, regulations and limitations contained in this article for the regulation of the separate estates of married women.”

The court will observe the general and sweeping language employed in these sections as applied to the estates covered by them. Sec. 2371 says, “ *all property* of the wife held by her previous to the marriage, or which she may become entitled to *in any manner*.” This language covers equitable as well as legal estates, and every interest that can be imagined. Again, in section 2388 the terms are, by *descent, gift, or otherwise*. What can be broader than this? If the legislature had sought to employ language that should cover every sort of estate, they could not have done it more effectually.

Now, what is that which passes between the husband and wife by his deed or gift to her, where he is solvent and able to make the gift? Agreed that by the common law the legal title did not pass, and yet something did pass, or else there would be nothing for equity to uphold. What is it, then, that does pass? Simply an equitable estate,

which a court of equity seizes hold of and upholds. Now, this right, this equitable estate, this interest that passes by this deed to the wife, is property ; it is worth something, and is something on which a court of equity seizes and decrees to the wife, and therefore is an estate. Can there be any doubt that it is embraced in the language of the sections above quoted? None in the world. Therefore, these statutes, acting upon these equitable estates, raise them to the dignity and effect of any other separate estate of the wife, and they give the wife on one of these estates the same status that she would have by the deed of a stranger.

What, then, is the conclusion to which we arrive in this particular case? 1st. If this deed is one falling within the case of *Stubbs v. Fisk*, in 30 Ala. 335, then the wife has a standing in court by herself. 2d. If the deed is one falling within the case of *Cannon v. Turner*, 32 Ala. 483, then the husband and wife must join in the suit.

P. HAMILTON, *contra*.—Such dealing between husband and wife as is shown in this case, is forbidden by the Code. Rev. Code, § 2374 ; *Reed v. Overall*, 39 Ala. 138.

Such suit must be brought in the name of the person having the legal title.—Rev. Code, § 2523.

At common law, such dealing would be illegal ; a title can not pass from husband to wife.—1 Pars. Cont. 358–59 ; 8 Term Rep. 545 ; 14 Smedes & M. 59 ; 1 Greenl. R. 394 ; 10 Cush. R. 550 ; 8 Vt. 187.

The Code uses positive language : “ Husband and wife *can not* contract with each other for the *sale of any property*.” This language is declared to be prohibitory.—39 Ala. 142, *supra*. It is certainly universal in its terms, and for very good reasons. Its intention is in accordance with the spirit of the new system, to remove the wife as far as possible from the undue influence of the husband.

PETERS, J.—This is an action of *assumpsit*, with special counts, for damages arising from bad, unskillful and negligent repairs of a steamboat shaft, while the boat was

in the service of the plaintiffs in the court below, as joint owners of the same. The appellants in this court were the plaintiffs below, and there was a verdict and judgment against them, from which they appeal to this court.

The bill of exceptions shows that on the 18th day of May, 1866, Hessee, Otis, Cox, Brainard and Waring, all citizens of Mobile, Alabama, being the owners of the steamboat "Flirt," for and in consideration of the sum of \$7,000 conveyed said steamboat and all its equipments to John P. Kennedy, J. H. Matthews & Co., J. M. Stone and B. W. Matthews, to be owned by them in shares as follows, to-wit: One-third by Kennedy, one-third by J. H. Matthews & Co., one-sixth by Stone, and one-sixth by B. W. Matthews. It further appears, that on the 26th day of May, 1866, said Kennedy being the owner of one-third, and said Matthews & Co. being the owners of one-third of said steamboat, for and in consideration of the sum of \$4,667 paid to them by Mrs. Mary A. Matthews and J. M. Stone, conveyed said steamboat and its equipments, to the extent of the interests owned by them, to said Mrs. Matthews and said Stone. At the date of this last named conveyance, Mrs. Matthews was the wife of said J. H. Matthews, of the firm of J. H. Matthews & Co. It was further shown, that, on the 6th day of April, 1867, J. M. Stone, of Mobile, Alabama, being the owner of two-thirds of the steamboat "Flirt," above-said, for and in consideration of the sum of \$3,333.33 paid to him by Mrs. Mollie J. Stone, conveyed to her all his interests in said steamboat and its equipments. It was also shown that at the date and execution of this conveyance Mrs. Stone was the wife of said J. M. Stone. All these transactions occurred in this State, and since the adoption of the Code of Alabama.

The action is prosecuted in the names of Mrs. Stone and Mrs. Matthews as sole complainants, who claim to be the joint owners of said steamboat, under the conveyances above said. There was some injury to the boat and their business in running said boat in this State shown, which was occasioned by the unskillful and negligent repairs

made by the defendants for plaintiffs, as alleged in the complaint.

On submitting the cause to the jury, on the trial below, the learned judge presiding, charged the jury in the following language, that is to say: "It appearing that Mollie J. Stone was the wife of J. M. Stone, and Mary A. Matthews was the wife of J. H. Matthews, (one of the firm of J. H. Matthews & Co.,) the deeds introduced by them and made by their respective husbands to them were not sufficient under the laws of Alabama to enable them to maintain this suit; that under the provisions of the Code in relation to the separate estate of married women, and under the common law, said plaintiffs had no title to the property which they could enforce in this court." To this charge the plaintiffs excepted, and now assign the same as error. Besides this, there are also two other assignments of error, but as they were not noticed at the bar or in the brief of the learned counsel, they will be treated as abandoned.—*Robinson v. Tipton*, 31 Ala. 595.

All persons of sound mind and sufficient age, in this State, who are otherwise able to make contracts, and where creditors have no prior liens, may sell or give their property to whom they please, when the person to whom the sale or gift may be made is not forbidden by law to receive it.—Benj. on Sales, p. 4. The fact that one is a husband does not curtail his capacity in this respect. It is true that at common law, neither the husband nor any one else could sell or give the property to his wife, so as to clothe her with a title that she could exert or defend in a court of common law; because under that system the wife's identity was merged in the husband.—2 Kent, 162; Co. Litt. 112; 1 Pars. on Cont. 345. But her identity was not so utterly destroyed by the marriage that she could not receive and hold, and own property for her own use, notwithstanding her coverture. It is very clear that she could, and that she might derive title to it from her husband during her coverture; though usually the conveyance was to a trustee for her use. In either case a court of equity would protect her rights in the property, what-

ever they might be.—2 Kent, 163 ; 2 Story Eq. §§ 1379, 1380. At common law a husband could not give or sell his property to his wife during coverture ; because this would be construed as a gift or a sale to himself, and nothing passed to the wife that a court of common law would recognize as property. Yet, the effort to sell or to give in this way was not a nullity ; unless it was in violation of the statute of frauds. There was a right to the property thus vested in the wife, which could be enforced and protected in a court of chancery. So stood the common law and equitable rights of the wife up to the time of the enactment of our statute, which changed the whole system.

There can be no doubt about the constitutional validity of this important enactment. The legislative authority of the State can emancipate the wife from all her disabilities as a *feme covert* at common law. Indeed, the general assembly may obliterate the whole system of the common law in the State, if the public policy require it. They may, therefore, change it and modify it in any way to suit the demands of State policy, if, in the change, they do not assail the obligation of contracts previously existing. In this view of the legislative authority, it has been the frequent and uniform practice in this State to pass laws to authorize married women, during coverture, to act and transact business as *feme sole* traders ; that is, in the language of these statutes, to make them “free-dealers.” (Pamph. Acts 1859–60, p. 621 ; *Carleton & Co. v. Banks*, 7 Ala. 32 ; 669 *et passim*. In the exercise of this sovereign right the law of the Code, defining and regulating the estates of married women, was enacted. The language of this statute is very broad ; seemingly as broad as it can be made, without useless tautology. This declares that, *all property* of the wife, held by her previous to marriage, or which she may become entitled to after marriage, *in any manner*, is the separate estate of the wife, and is not subject to the payment of the debts of the husband.”—(Rev. Code, § 2371). The wife’s rights to her estate are not impeded by the inviolability of the contract of marriage. The legislative authority of the State is not forbidden to deal with

this contract as it may think best. Such contracts have no constitutional protection.—(*Dartmouth College v. Woodward*, 4 Whea. 518; *Marshall, C. J., arguendo*; *Holmes v. Lansing*, 3 John. Cas. 73; *White v. White*, 5 Barb. 474. But see *Holmes v. Holmes*, 4 Barb. 295; *Ponder v. Graham*, 4 Flor. 23). This statute overturns the old system, and makes the wife capable of owning property independent of the husband. In this respect, she is no longer the wife at common law. She is the wife under the law of Alabama. This law is thoroughly repugnant to the whole theory of the common law upon the subject of the wife's property; and it very properly provides a code of rules for the management of the estate held under it. It also seems that it is intended, that all estates which have accrued to married women in this State since its passage, must be affected by its provisions.—(Rev. Code, §§ 2382, 2388). For, evidently, aside from the force of these sections of the Code, every contract, whether of gift or sale, includes the law at the date of its execution, which governs its effect, as a part of its stipulations. Otherwise a contract might defeat the law.—(4 Wall. 535, 550; 8 Whea. 92; 1 How. 319; 12 Whea. 231; 9 Cr. 43; 9 Pet. 359). This important statute necessarily makes the wife capable of receiving and owning property, and does not limit her acquisitions to any particular sources. Her relation to her husband, in this respect, is changed. Before the statute, he could not give or convey to her, because this was but a gift or conveyance to himself. And it was ineffective for this reason, and not because such a gift or conveyance was illegal. This was not the case, if done in a proper way.—(2 Story Eq. §§ 1379, 1380, *et seq.*, and cases there cited. Now the statute has removed the merger, and restored the wife to a capacity to receive and own estates as fully as though she were a *feme sole*. These deeds, then, conveying the steamboat "Flirt" by the husbands of the plaintiffs, as shown in the record, are not void. And were they even voidable, which is not admitted, they could only be avoided by the husbands themselves or by some person having rights under the husbands, who would be entitled to stand in their shoes.

This could not be done by these defendants. They are strangers to the deeds.—(10 Bouv. Bac. Abr. p. 382, F.) If the husbands permit these deeds to stand, no one else, save under some circumstances their creditors, have any right to complain. This action is founded on the agreement to repair the plaintiffs' steamboat shaft, made with them by the defendants, as the owners of the boat. Having contracted with the plaintiffs as owners, the mouths of the defendants are shut to deny this; as the married women do not repudiate this agreement, the defendants cannot do it. They were bound to perform their agreement in a proper way or to abide the consequences of a failure. The possession and use of the steamboat, under even an equitable claim, was sufficient to entitle the plaintiffs to repair, so as to make the use as beneficial as possible; and if the defendants agreed to make such repairs, they were bound to do so in a proper way; or they must answer in damages for a failure. If the agreement to make the repairs was legal, then the defendants must show that they had complied with its terms on their part. It is conceived that any legal possession of the boat would authorize the plaintiffs to make an engagement for its repairs. They might be entitled to the use by the mere permission of their husbands; and to deny them the right to repair, would defeat the purpose of this permission. Such an unreasonable contradiction is not to be presumed in the face of the deeds, which exhibit the most emphatic permission, if nothing more.—*McGrath v. Robinson*, 1 Desaus. 445.

I therefore think that the deeds relied on by the plaintiffs below, show a sufficient possession and property in them to support this action. Consequently, the charge of the court above was erroneous.

The judgment of the court below is reversed and the cause is remanded for a trial *de novo*.

[NOTE BY REPORTER.—At a subsequent day of the term, Mr. P. Hamilton, of counsel for appellee, filed an argument in support of an application for a rehearing. The argu-

ment did not come into the Reporter's hands. The following response was made by] :

PETERS, J.—The application for the rehearing in this case, is but a repetition of the case as heard upon the original submission. It is, then, but an application to the court to recede from the original determination of the cause. The points suggested by the learned counsel for the rehearing are of very great difficulty, but the constructions urged upon the court are not such as we are content to adopt in this case. Their answer must be looked for in the principles laid down in the opinion in the chief case. The rehearing is denied with costs.

BRADLEY ET AL. *vs.* GRAVES.

[ACTION ON PROMISSORY NOTE.]

1. *Complaint; what words are mere descriptio personæ.*—Where a plaintiff styles himself guardian of A. B., and declares on a note payable to him, in that character, but the suit is not brought for the use of the ward, the action is his individual suit, and the superadded words, "guardian of A. B.," will be regarded as mere *descriptio personæ*; and on the death of the plaintiff the suit should be revived in the name of his personal representatives.
2. *Promissory note; what constitute payment.*—In such a case, if the action is revived in the name of the ward, who has become of full age, without objection, a payment made to the deceased plaintiff, before suit brought, will be an extinguishment of the debt, and a good defence to the action, although the note may remain in the hands of the payee, after payment, and, subsequently, come to the possession of the ward, before the suit is so revived in his name; unless the note was left in the hands of the payee, for an improper and fraudulent purpose.

APPEAL from Circuit Court of Butler.

Tried before Hon. P. O. HARPER.

Bradley et al. v. Graves.

The complaint in this case was as follows :

"The State of Alabama, } Circuit Court,
Butler county, } Fall term 1866.

*B. Graves, guardian minor heirs of S. Graves, plaintiff, vs.
G. W. Bradley, B. B. Rue, defendants.*

The plaintiff claims of the defendants the sum of four hundred dollars due by promissory note made by them on the 16th day of February, 1864, and payable on or before the 25th December next, after date, with interest thereon.

LANE & GAMBLE,

Plaintiff's Attorneys."

The summons was dated 28th August, 1866, and commanded the defendants to appear, &c., to answer the complaint of "B. Graves, guardian," &c.

When the cause came on for trial a minute entry of the court shows that the parties came by attorneys, "and it appearing to the satisfaction of the court that the guardian, B. Graves, is dead, and that the note on which this action is founded is now the property of John Graves, who was a minor heir of S. Graves, but is now of full age, on motion, said John Graves is made party plaintiff to this action."

No objection was made to this order of the court.

The proof tended to show that while said B. Graves held said note, which was payable to B. Graves "as guardian of the minor heirs of S. Graves, deceased," said Graves had in his hands money belonging to one Cain, more than sufficient to pay the note made by appellants; that Bradley, one of the appellants, at Graves' request, got an order from Cain directing Bradley to pay over this money to the appellants; that upon presentation said Graves accepted said order and agreed to consider appellant's note paid by the transfer of Cain's money in his hands, and said he would give up the note in a few days; that just at the time the note was at home with his papers and he could not conveniently get it then. Both Graves and the appellants considered the note paid after this. There was, also, proof that some three months afterwards, when one of the appel-

lants asked Graves for the note he refused to give it up and brought suit on it.

The note was overdue when it came into the hands of the said John Graves, but it does not appear at what date Bradley made the payment aforesaid.

The court charged the jury, "that although the defendant, Bradley, might have paid the note to B. Graves, the guardian, while he held the same as guardian; yet if at the time of such payment the note was not given up to him, but was afterwards turned over to the ward, said ward would have the right to collect it, and that the ordinary rule of law in relation to defenses against transferred notes did not apply as against wards who had *bona fide* come into possession of notes in which they were beneficiaries."

The defendants excepted to this charge, and also to the refusal of the court to give the following written charge asked by them: "If Graves held the note as guardian, then as guardian he had the right to collect it. If he had a right to collect, Bradley had a right to pay. If Bradley did pay the note and did pay it to Graves while he so held it as guardian, then neither the ward nor any one else into whose hands the note might come after it had matured and had been paid, can in law compel Bradley to pay it again."

The charge given, and the refusal to give the charge asked, are now assigned as error.

HERBERT & BUELL, for appellant.

GAMBLE & POWELL, *contra*.

PECK, C. J —1. Where a writ is to answer A, guardian of B, the words "guardian of B," are mere matter of description, and the suit is the suit of A.—*Dowel v. Wardsworth*, 2 Dev. 130.

In a note the word "guardian," annexed to the name of the payee, is only descriptive of the person.—*Baker v. Ormsby*, 4 Scam. 325.

Where a plaintiff styles himself executor or administrator, and declares on a note payable to him, in that charac-

ter, but does not aver that the note is assets of the estate, the action is his individual suit, and the superadded words are mere *descriptio personæ*.—*Arrington v. Hair*, 19 Ala. 243; *Tate v. Shackelford, adm'r.*, 24 Ala. 510. And, in such a case, on the death of the plaintiff, the suit should be revived in the name of his personal representatives.

These authorities are sufficient to show, that this was the individual suit of the original plaintiff, B. Graves, and, on his death, should have been revived in the name of his personal representatives, and not in the name of the appellee, who, the minute entry of the court states, was one of the heirs of S. Graves, and of full age, and that the note, the foundation of the action, was his property.

By section 2446 of the Revised Code, gurdians may sue in their own names, "*for the use of the ward,*" in all cases where the ward has an interest, and the judgment enures to his benefit.—*Hutton v. Williams*, 35 Ala. 503; *Longmire v. Pilkinton*, 37 Ala. 296; but this action was not brought for the use of the wards.

We hold that the correct practice, in a case like the present, is, on the death of the plaintiff, pending the suit, to revive it in the name of his personal representatives, and, on the settlement of the guardian's accounts, by them, on proof that the note belonged to the ward's estate, to charge the deceased guardian with the sum recovered.

We have said this, that it may not be inferred, as otherwise it might be, that we recognize and approve of the course pursued in this case; but as the irregularity was not objected to, the judgment will not be disturbed on that account.

2. The only real question, arising on the bill of exceptions, is as to the legal effect of the evidence. If true, did it show the note had been paid to the original plaintiff before his death? If it did, the charge of the court is erroneous. If the evidence proves what the bill of exceptions states it tended to prove, we hold it clearly establishes the payment of the note. This the charge does not seem to deny, but it instructs the jury, "that although the defendant, Bradley, might have paid the note to B. Graves, the

guardian, while he held the same as guardian, yet, if at the time of such payment the note was not given up to him, but was afterwards turned over to the ward, said ward would have the right to collect it.

In this the court was certainly mistaken. The failure to deliver the note to the defendant, at the time of the payment, for the reason given by the evidence, did not, in any manner, change the legal effect of the payment, either as between the original parties, or the appellee, who, as it is shown, obtained it after the suit was commenced.

3. The charge in writing, asked by the defendants, was improperly refused; it was a correct statement of the law, and fully warranted by the evidence.

Whether the note belonged to the plaintiff, B. Graves, individually, or as guardian, the payment was properly made to him, and the payment was an extinguishment of the debt, although it continued to remain in his hands. Payment made to an intermediate holder of a note, indorsed in blank, whose name does not appear on the note, such holder being, really, the owner at the time, is a good payment.—*Richardson v. Farnworth*, 1 Stewart, 55. If the note had been left in the hands of the payee, after payment, for an improper, fraudulent purpose, the rule would be otherwise, as between the maker and a subsequent *bona fide* holder, for value; but that is not pretended in this case; the note was not given up, because it was not at hand when the payment was made.

Let the judgment be reversed and the cause remanded, at the appellee's cost.

INGERSOLL vs. CAMPBELL.

[ACTION FOR MONEY HAD AND RECEIVED BY DEFENDANT FOR USE OF PLAINTIFF.]

1. *Blockade; contract to violate; when void.*—A government, during a rebellion against its authority, may legally blockade its own ports in possession of the insurrectionary authorities, and a contract to violate such blockade is illegal and can not be enforced.
2. *Same; what contract growing out of, may be enforced.*—But money earned upon such a contract and paid to the party earning it, vests in the person so earning it a good and legal title; and if, after such payment, he deposits or leaves such money with a person to keep for him, he may recover it from him, although the person with whom the money was so left, as agent for another, made the contract to violate such blockade.
3. *Bailee, when becomes liable for interest.*—If one person holds the money of another on deposit to keep until demanded, and on demand and without reasonable excuse refuses to deliver such money, he becomes liable for interest from the time of the demand.
4. *Charge to jury; when will be presumed to have been rightfully refused.*—Where all the evidence is not set out in the bill of exceptions, it will be presumed, in order to sustain the refusal to give a charge, that it was abstract and not supported by the evidence delivered on the trial.

APPEAL from the Circuit Court of Mobile.

Tried before Hon. JOHN ELLIOTT.

This was an action commenced by Campbell against Ingersoll for money had and received by him to and for the use of the plaintiff. There was a jury trial, and verdict and judgment for Campbell.

From the bill of exceptions it appears that there was evidence offered on the trial in the court below, which was received without objection, which tended to prove that Campbell was a pilot residing in the city of Mobile in this State, in the year 1864, during the late civil war, and that as such pilot he was employed by Hopley & Co. of Charleston in the State of South Carolina, to take charge of the British ship "Virgin," then in the port of Mobile, and pilot the same from said port of Mobile to Havana in Cuba, and

bring another boat back again from Havana to Mobile, if required to do so by the agents of Hopley & Co. in Cuba, for which service the sum of three thousand dollars in gold was to be paid him, as follows: one thousand dollars in advance at Mobile, five hundred dollars on the arrival of the "Virgin" at Havana, and five hundred dollars on the departure of Campbell from Havana, and one thousand dollars on his return and arrival at Mobile; and, in case Campbell was not required to return to Mobile after reaching Havana, he was then to be paid fifteen hundred dollars in gold and his expenses back to a "Confederate port." At the time of this agreement to pilot the "Virgin" to Havana, the port of Mobile was blockaded by the forces of the United States, and the full performance of the agreement with Hopley & Co. thus made, required a violation of such blockade. Ingersoll was the agent of Hopley & Co. in Mobile, and it was through him that Campbell was employed. The "Virgin" was loaded with cotton, and "when she was ready to depart on her voyage from Mobile, she being loaded and ready for sea," Campbell "was ready and willing to go, and before leaving went to Ingersoll's office to arrange his business prior to his departure," when Ingersoll said to him, "I suppose you want your money?" Campbell replied, "he did not want it then, as he had enough." Ingersoll then said, "well, shall I pay it to your wife?" Campbell replied that his wife had enough—"put *my money* in a sterling bill and *keep* it till my return." Ingersoll then directed his book-keeper to draw a sterling draft for Campbell. On the same day that this occurred, Campbell left on the "Virgin," and went down the bay on her. The captain of the "Virgin" watched for some time for an opportunity to put to sea, but the United States fleet having entered the bay, the "Virgin" was finally brought back to Mobile and the voyage abandoned, the cargo landed and the crew were paid off by Ingersoll. Shortly after this Campbell was arrested by the United States military authorities and kept as a prisoner of war for about one year. On his return to Mobile, after his release, Campbell called on Ingersoll and demanded his money left

Ingersoll v. Campbell.

with Ingersoll, and its payment was refused, Ingersoll saying, at the time, that he had no money in his hands for him.

The bill of exceptions further states that there was testimony that Hopley & Co. were still solvent; that Ingersoll disbursed the vessel in Mobile; that Ingersoll, before the demand of plaintiff, had settled all his affairs with Hopley & Co. and turned over to them all their property which had come into his hands. There was also evidence tending to show that, at the commencement of the suit, Ingersoll had no property in his hands belonging to Hopley & Co., and that the money disbursed by him was furnished from time to time by Stewart, of the firm of Hopley & Co.

The bill of exceptions then states: "Upon the foregoing evidence the court charged," &c.

The court charged the jury in substance, that the contract to run the blockade, &c., by which plaintiff was to receive \$1,000 in advance, as set forth in the evidence, if they believed it, was illegal and void and could not support an action; but, on the other hand, if such a contract was made and once executed, although illegal, the law would not aid any party in seeking to recover back any money paid under it. If the jury should believe from the evidence that the defendant actually had in his possession one thousand dollars in gold, placed in his hands by the owners of the "Virgin," to be paid to plaintiff as a pilot on the "Virgin," to enable her to evade the blockade then existing at the port of Mobile, and that defendant acknowledged he had it, and the plaintiff left it with the defendant, then this would be a payment by Hopley & Co. to the plaintiff, and plaintiff would have a right to recover it from the defendant, because amounting to a payment from Hopley & Co. to Campbell.

The defendant excepted to the giving of this charge, and requested three written charges, in substance as follows:

1st. If the jury believe that the object of the contract, as an incident of which this suit is brought, was to run the blockade, &c., [as set out in the evidence,] then plaintiff can not recover.

2d. That although the jury believe, from the evidence, that defendant received the money or its equivalent, they can not find for the plaintiff, "if it appears that defendant has since settled up with the parties from whom he is alleged to have received it."

3d. That plaintiff can not recover unless he has shown that the defendant actually received money, or money's worth, as the property of the plaintiff, previous to the commencement of the suit, nor could he recover any more than the amount which the plaintiff has shown was actually so received by defendant, and if any such money had been actually so left in his hands, but left under an illegal contract, then plaintiff could not recover.

To a refusal to give these charges defendant excepted, and now brings the case here by appeal, and assigns as error—

1st. The charge of the court.

2d. The refusal to give the written charges asked by the appellant.

P. HAMILTON, for appellant.—The contract to evade the blockade was illegal, and the courts of this county will not enforce it.

2. The plaintiff's claim does not rest on contract with defendant. Its merit, if it have any, is that plaintiff, *ex equo* and *bono*, is entitled to the money, and the form of action is equitable, and merits of plaintiff's case can be inquired into.—10 Ala. 836 ; 2 Barb. 136 ; 2 Denio, 91 ; 7 Ala. 486 ; 13 Wend. 490.

3. To assert an equity in plaintiff, in such case, is a contradiction in terms.—13 Ala. 406 ; 16 Wend. 574.

4. Hopley & Co. had a right to withdraw their money from Ingersoll.—22 Pick. R. 181.

5. If money in hands of an agent be withdrawn, before the claim be made by the third party, the right of action against the agent is gone.—4 Cow. R. 454 ; 4 Burrows' R. 1984.

For the correctness of the principle assumed by defendant,—See 24 Wend. 387 ; 15 N. Y. 9, 95.

GEORGE N. STEWART, *contra*.

(Appellee's brief did not come into Reporter's hands.)

PETERS, J.—The evidence in this case tends to show that Campbell entered into two contracts with Ingersoll: The one with him as the agent of Hopley & Co., to pilot the ship "Virgin" from the port of Mobile to Havana, in violation of the blockade maintained by the forces of the United States of the said port of Mobile. There is no doubt, that in case of a civil war or rebellion, a government may blockade its own ports.—*Prize Cases*, 2 Black. 635; Pres't Lincoln's Proc. of Blockade, April 19, 1861; U. S. Stat. at Large, appendix, p. ii, No. 4; *Santissima Trinidad*, 7 Wheaton, 283. And a contract to violate a blockade so set on foot was void, because it was forbidden by the public policy of the nation.—*Kennett v. Chambers*, 14 How. 38.

The second contract was made by Campbell with Ingersoll, in his individual capacity. In this the evidence tends to show that Ingersoll agreed to become the bailee of Campbell for the one thousand dollars in gold, which was advanced to Campbell by Hopley & Co., in part execution of the illegal agreement to violate the blockade. This contract of bailment the jury by their verdict have declared did exist. If it did, it was not illegal. On the payment by Hopley & Co., through their agent, Ingersoll, of the one thousand dollars in gold to Campbell, on the contract to violate the blockade, the money thus paid became the property of Campbell. The illegality of the contract on which this money had been earned did not taint the validity of Campbell's title to it. And if it was Campbell's money, then he could leave it or deposit it with Ingersoll to keep for him until his return, and Ingersoll might agree to this. Such a transaction would not be unlawful. It was at least a deposit which amounted to a naked bailment, if no more.—*Story's Bailm.* §§ 3, 4; 2 Pars. Cont. 89, 96, 97; 2 Kent. 559, 560, 566, 567. There can be no reasonable question about the lawfulness of such a con-

tract. Upon this bailment, it seems, this action is founded, and not upon the contract to violate the blockade. A legal agreement may be connected with matters growing out of the execution of an illegal contract, but this connection does not necessarily taint the legal transaction with illegality.—*Armstrong v. Toller*, 11 Wheaton, 258. Such is the case in this instance. Then, it appears that the contract between Ingersoll and Campbell, whatever this might have been, was not forbidden by law.

On such a contract interest is recoverable, after demand. *Porter v. Nash*, 1 Ala. 452; *Kirkman v. Vanleer*, 7 Ala. 217; *Cheek v. Waldrum and Wife*, 25 Ala. 152; *Maxey v. Knight*, 18 Ala. 309.

The charge of the court below was in conformity with this exposition of the law applicable to the facts, and it was therefore free from error. The first and second charges, asked by the defendant below, which were refused by the court, being in opposition to the charge as given, were properly refused. The third charge asked by the defendant was correct, so far as it placed the right to recover on the fact that the defendant must have actually received money or money's worth as the property of the plaintiff, previous to the commencement of the suit.—Greenlf. Ev. § 117; *Hill's Adm'r v. Kennedy*, 32 Ala. 523; *Hitchcock v. Luken's*, 8 Port. 333. But the second portion of this charge is erroneous; because it limits the recovery to the amount deposited, and assumes that the contract upon which it was deposited was illegal. The bill of exceptions does not purport to set out all the testimony delivered in the cause. In such a case, the presumption to be indulged in this court is, that there was evidence before the court below to support the action of that court. It will therefore be presumed that this charge was not supported by the proofs, and, therefore, properly refused.

Let the judgment of the court below be affirmed.

BLOCK vs. McNEIL.

[TROVER FOR CONVERSION OF COTTON.]

1. *Cotton sold for Confederate money; when trover will lie against vendor for conversion of.*—Although Confederate treasury notes can not be considered a sufficient consideration to support a contract for the sale of property; yet where cotton was sold during the late war for which payment in such currency was accepted, if the vendor ceased to hold the cotton as owner and became the bailee of the purchaser, the latter may maintain trover against him, if he converts it.

APPEAL from Circuit Court of Wilcox.

Tried before Hon. P. O. HARPER.

On the 5th of January, 1863, the appellee executed a writing in which she acknowledged that on the 30th of December, 1862, she had sold to the appellant fourteen bales of cotton, for which she had received full payment. She also agreed to keep the cotton at the disposal of the appellant, and to take as good care of it as if it were her own, and also to deliver it to him on his demand. There are two other writings signed by her, each dated December 30, 1862, witnessing the receipt of a part of the purchase-money, and the same admission of a sale to the appellant, and ownership in him, and obligation on her part to deliver it to him when called for. It was proved that the consideration given for the cotton was Confederate treasury notes.

The suit being by the appellant for the conversion of the cotton, the court charged that all of the written instruments must be construed together; that the obligation to keep and deliver was supported only by the same consideration as the sale, and that if that consideration was Confederate currency, it was insufficient to support the contract or obligation. To this charge the appellant excepted, took non-suit and bill of exceptions, with leave to set aside the non-suit in the supreme court.

The charge of the court is now assigned as error.

S. G. COCHRAN and R. H. DAWSON, for appellant.—The charge given to the jury was erroneous and ought not to have been given.—See opinion of Chief Justice Chase in the case of *Thorington v. Smith & Hartley*, at November term, 1869, of the Supreme Court of the United States.—8 Wallace, p. 1.

S. J. CUMMING, *contra*.—The charge excepted to should have been refused. The case of *Thorington v. Smith*, 8 Wall. p. 1, does not touch the principle involved in this charge. The proof is clear that the *only* consideration of the contract sued on, was Confederate treasury notes. This question is settled by the ordinance of the convention of 1867, and by the decisions of this court.

The Kentucky courts have held that in contracts founded on Confederate money, they will not aid either party, but leave them in *statu quo*.—*Laughlin v. Dean*, 1 Duvall, p. 20.

B. F. SAFFOLD, J.—The case of *Hale v. Houston, Sims & Co.*, January term, 1870, decides that Confederate treasury notes is not a valid consideration in an unexecuted contract.—*Herbert & Gessler v. Easton*, 43 Ala. p. 547, and *Thorington v. Smith*, 8 Wall. p. 1, assert the proposition that a contract which might have been discharged by the payment of Confederate currency is valid, with this only apparent difference—that in the former it was held, construing an ordinance of the State, that the measure of damages for the breach of such a contract was the value of the property at the date of the sale, and in the latter, the value of the currency in lawful money, at the same date, was declared to be the measure of recovery. It is manifest that, unless the contrary is shown, the value of property at the date of its sale in lawful money is the value of the currency agreed to be taken in exchange in the same money, on the axiom that things which are equal to the same thing are equal to each other, at least so far as the parties to such a contract are concerned.

Shaw v. Lindsay et al.

In *Ponder v. Scott*, June term, 1869, the acceptance of payment in Confederate currency of a debt by the owner in his own right, and not in a fiduciary capacity, was held to extinguish the debt, on the ground of a person's privilege to do as he pleases with his own, and the binding effect of voluntary acts when completed.

In this case, if there had been only an agreement to sell the cotton, or even an actual sale of it for Confederate currency, which was paid without a delivery of the cotton, the principle in *Hale v. Houston, Sims & Co., supra*, would govern it. But inasmuch as the jury might well infer from the evidence that Mrs. McNeil had parted with the ownership and possession of the property sold, and had become the bailee of the plaintiff, in which case the contract would have been completely executed, the charge of the court was calculated to mislead the jury, and, in that respect was erroneous.

While Confederate treasury notes can not be considered a sufficient consideration to support a contract for the sale of property; yet, if the property was delivered, and payment in such currency accepted, and the vendor held the property as bailee only of the purchaser, he is liable in an action of trover if he converts it.

The judgment is reversed and the cause remanded.

SHAW vs. LINDSAY ET AL.

[MOTION TO SET ASIDE SHERIFF'S SALE OF LAND, &C.]

1. *Sheriff's sale, &c.; when will not be set aside.*—A sale, under a writ of *fiery facias* by the sheriff, will not be set aside on the motion of a person not a party to the judgment or interested in it, when it appears that the execution has been regularly issued, and there is no mistake or fraud or gross inadequacy of price bid at the sale, which is prejudicial to the party making the motion.

Shaw v. Lindsay et al.

2. *Confederate judgments; force and effect of.*—The judgments of the Confederate government in this State, rendered during the late rebellion, do not operate as liens on the lands of the defendant therein. They have only the force of the judgments of foreign courts.
3. *Same; when sale of land under will not be set aside.*—A sale of the lands of a defendant in such a judgment will not be set aside on the motion of a stranger, who has no interest in the judgment, but claims such lands by a title derived from a defendant in such judgment, acquired in 1866, by a purchase independent of the judgment. Such a sale does not necessarily prejudice the rights of such a claimant.

APPEAL from Circuit Court of Pickens.

Tried before Hon. LUTHER R. SMITH.

The facts are sufficiently stated in the opinion.

M. L. STANSEL, for appellant.

REAVIS & COOKE, *contra*.

(No briefs came into the Reporter's hands.)

PETERS, J.—This is a motion made in the circuit court of Pickens county to set aside a sale of certain lands sold by the sheriff of said county as the property of Elihu Cox. The motion was made by Shaw, who was neither a party to the judgment or interested therein, or in the lands sold at the date of the judgment. The motion was against T. F. Lindsey and W. L. Lipsey, late sheriff of said county of Pickens. The motion was refused and overruled, and Shaw appeals to this court. The proceedings in the court below, as set out in a bill of exceptions taken on the trial, show that said T. F. Lindsey obtained a judgment in the rebel circuit court of said county of Pickens, against Lang, Noland, and said Cox, on the 28th day of April, 1863, for the sum of \$2,705.62. The record of this judgment was destroyed by fire in April, 1865, and on the 4th day of May, 1867, this record was substituted, "under the act to substitute lost and destroyed records, approved January 18th, 1866." Execution was issued on this substituted record on May 25th, 1867, and on the 7th day of October, 1867, a portion of the lands of said Cox were sold under this execution and purchased at said sale, which

Shaw v. Lindsay et al,

was made by said sheriff of said county, by said Lindsey, the plaintiff in said judgment. A second execution was issued on said judgment, on November 16th, 1867, and under its authority a second portion of Cox's lands were sold, and again purchased by Lindsey, on January 6th, 1868. For these lands Lindsey received the sheriff's deed, and went into possession of the same. On the 23d day of August, 1866, Cox conveyed the lands above mentioned by deed of trust to Shelton, and Shelton, sold the same under said deed of trust to Lathan, on August 24th, 1867, and on the 30th March, 1868, Lathan conveyed to Shaw by quit-claim deed. Under this title Shaw made the present motion.

From this statement of facts, it appears that Shaw was a stranger to the judgment, and had no interest in the lands aforesaid at the date of said judgment, or until long afterwards. And he asks to have the sale set aside, because this judgment was void, and because it had been rendered by a Confederate judge. But this is not the law. Such a judgment is not void. At the same time it does not operate as a lien on the lands of Cox, unless it appears that there was an execution issued thereon, and regularly kept up, without the lapse of an entire term; which is not pretended.—*Martin v. Hewitt*, 44 Ala. 418; *Moseley v. Tut-hill et al.*, June term, 1871; *Irvin v. Armistead*, June term, 1871. The sale, then, did not prejudice Cox's title, whatever it might be; and he has no reason to complain of it. And it is only upon the ground that the sale was irregular or fraudulent, and would be injurious to him, that the court would be justified in setting it aside.—*Mobile Cotton Press v. Moore & Maghee*, 9 Port. 679; *McCollum v. Hubbert & Cople*, 3 Ala. 259; *McCaskill v. Lee*, 39 Ala. 131. It can not be said that the *fiery facias* in this case was improperly executed, or that the sheriff was guilty of any mistake, irregularity or fraud prejudicial to Shaw. He does not, therefore, bring himself within any of the reasons which would authorize the court to interfere in his behalf. Then the motion was properly refused.

The judgment of the court below is affirmed at appellant's costs.

HENRY ET AL. vs. PORTER PRO AMI.

[BILL IN EQUITY TO DECLARE FUNDS PLACED IN HANDS OF GRATUITOUS BAILEE BY HUSBAND THE SEPARATE ESTATE OF THE WIFE AND TO COMPEL PAYMENT TO WIFE, &c.]

1. *Bank bills, gratuitous bailee of ; what acts do not make liable for depreciation of, &c.*—Where the gratuitous bailee of a naked deposit of bank bills deposited them with a person of due credit, who made a general deposit of them with a bank of good credit, and when called on to return them delivered the proper sum in bills of the same bank, but not the identical ones received by him, equity will not hold him responsible for the depreciation of the bills on account of the failure of the bank which issued them.
2. *Gratuitous bailee ; degree of care required of.*—Of such a bailee is required only that degree of care which every person of common sense, though very absent and inattentive, applies to his own affairs.

APPEAL from Chancery Court of Butler.

Tried before Hon. ADAM C. FELDER.

B. F. Porter having sold a piece of land to Patterson, upon which Abrams claimed a lien, and Patterson refusing to pay the purchase-money on that account, one thousand dollars of it in bills of the Northern Bank of Alabama was, by agreement of the parties, deposited with the appellant, Henry, to await the issue of Abrams' claim.

The bill was filed in 1861 by the complainant, who was the wife of B. F. Porter, to have this money declared her separate estate, and to enjoin Henry from paying it to any other person ; and the proper parties were made defendants thereto. In 1863 an order was made requiring the depositary to pay the funds into the court, but no further action was taken in this particular until 1866, when another order to the same effect was made. In obedience to a citation issued upon this last order, which seems to have been the first service of any process upon him, Henry paid into the court the amount required in the bills specified. The complainant then amended her bill by charging that the

Henry et al. v. Porter pro ami.

bills returned were not the identical ones delivered, and that they were then greatly depreciated in value.

The defendant deposited the bills received by him with A. G. Henry, who made a general deposit of them with other persons. He was a gratuitous bailee, and did not use the funds himself, or mix them with other funds so as to destroy their identity, unless the act of A. G. Henry should be imputed to him. He testified for himself that it was part of his agreement with B. F. Porter that he should be at liberty to redeposit it with A. G. Henry. Porter denied this in an affidavit, but such an *ex parte* statement can not be regarded as evidence to charge Henry. Samuel and A. G. Henry were mercantile partners at the time. The chancellor found from the proofs that the special deposit of one thousand dollars with Samuel Henry was the money and part of the separate estate of complainant, and was of par value when deposited with Henry, and that the money returned into court by Henry was greatly depreciated and not the identical money deposited with him, and decreed accordingly that complainant recover of defendant, Henry, the sum of \$1250, it being the amount deposited and interest from December 30th, 1866, the date of the interlocutory order requiring him to pay over and deposit to the register, &c., and all the costs not adjudged against the other defendants, and upon satisfaction of the decree to have leave to withdraw the deposit made by him with the register. Henry appeals (the appeal being in the name of all,) and assigns the decree of the chancellor as error.

HERBERT & BUELL, for appellant.

THOS. J. JUDGE and J. A. MINNIS, *contra*.

(No briefs came into Reporter's hands.)

B. F. SAFFOLD, J., (after stating facts as above.) In a naked deposit or simple bailment for the benefit of the bailor alone, but slight care is required of the bailee, and he is responsible only for gross

negligence. Slight care is that degree of care which every person of common sense, though very absent and inattentive, applies to his own affairs.—1 Parsons on Contracts, pp. 570–71. If a mere depository mix money deposited with his own funds with the intention of restoring an equivalent, and so destroy the identity and individuality of the subject matter of the bailment, this would be a user of the money which would at once alter the nature and character of the bailment, converting it into a loan for use and consumption. In a bailment by way of *mutuum* the chattel bailed becomes the absolute property of the bailee to do what he pleases with it.—Ad. on Cont., pp. 527–43.

It is plain that to convert a simple bailment of money into a loan, an intention of user should concur with the act of the bailee, which, indeed, is shown when the act itself excludes a contrary supposition. Story says, if a trustee should mix the trust funds with his own in a common account with his banker, he would be deemed to have treated the whole as his own, and he would be liable for any loss sustained by the banker's insolvency. But if he should deposit the money with a banker in good credit, to remit it to the proper place by a bill drawn by a person in due credit, and the banker or drawer of the bill should become bankrupt, he would not be responsible. The true rule in cases of this sort is, that where a trustee acts by other hands, either from necessity or conformably to the common usage of mankind, he is not to be made answerable for losses.—2 Story's Eq. Jur. §§ 1269–70.

A bailment is treated in equity as a trust, but the reason seems to be to enable the beneficiary to recover the fund which, in law, he might not be able to do on account of want of privity in the contract.—2 Story's Eq. Jur. § 1041. It may be deduced, then, in view of the degree of care required of a gratuitous bailee, that if he should deposit the funds received with a person in due credit, and without any intention of restoring an equivalent, he should not be held responsible for their depreciation on account of the failure of the bank which issued them. Henry would have done his whole duty by returning the identical bills.

Henry et al. v. Porter pro ami.

The damage sustained by the complainant is not in consequence of his action. Equity, with its expansive powers of justice, will not apply to such a case the rule governing trustees charged with grave responsibilities.

The decree against the defendant Henry is reversed, and the cause remanded. In other respects it is confirmed.

NOTE BY REPORTER.—At a subsequent day of the term appellee, by J. A. Minnis, Esq., applied for a rehearing, contending that the proof of a conversion or “user” of the money by Samuel Henry was fully made out. As the argument in support of the hearing is based solely upon questions of fact, it is unnecessary in the view which the court took of the facts to refer further to it. The petition was responded to as follows :

SAFFOLD, J.—The only evidence touching the deposit made with Samuel Henry is that contained in the depositions of Samuel and A. G. Henry, and the writing of B. F. Porter set out in Samuel Henry’s testimony. The writing does not indicate any greater liability of the depository than he admits. He was not to be responsible for its application. When it was settled between Porter and Abrams what should be done with the money, Henry was to surrender it to the one entitled to receive it. We perceive no contradiction in the testimony respecting which of the Henrys received the money. Samuel was to keep it, and it mattered not whether he received it in person or by another. He mentions a circumstance which the complainant might have refuted or corroborated. A receipt was given for this money. Samuel says it was given by A. G. in his name, to whom the money was delivered by Porter. In the absence of that receipt it might have been difficult for the complainant to have established the fact of a deposit, but for the testimony of the defendant and A. G. Henry. The tenor of that testimony is certainly not in favor of the right of the complainant to recover as for a user.

A rehearing is denied.

HETHERINGTON vs. HIXON.

[BILL IN EQUITY TO FORECLOSE MORTGAGE.]

1. *Note already delivered, signing of as surety; when imposes no obligation on surety.*—The signing of her husband's note, previously made and delivered by him, by a wife, as his surety, does not impose on her any obligation which will sustain its subsequent recognition.
2. *Same.*—Where a widow gave her note, secured by mortgage, for the payment of her deceased husband's debt, at the instance of the promisee, the mere fact that his notes were given up to her is not proof of a valid consideration. It must be shown that obtaining the notes, as something of value, entered into the inducement to her agreement.
3. *Same.*—In such a case, loss subsequently sustained on account of a failure to file the notes as claims against his insolvent estate, can not create a consideration, although the non-claim was in consequence of the creditor's belief that he had otherwise secured their payment.

APPEAL from Chancery Court of Monroe.

Heard before Hon. CHARLES TURNER.

The facts are stated in the opinion.

J. W. POSEY, for appellant.

R. C. TORREY, *contra*.

(No briefs came into Reporter's hands.)

B. F. SAFFOLD, J.—The appeal is taken from a decree foreclosing a mortgage given to secure the payment of a promissory note executed under the following circumstances: Mrs. Hetherington, during her marriage, signed, as surety for her husband, a note which had been previously made and delivered by him. After his death she executed a note for \$1,000, the consideration of which was this note, and another for about \$200, signed by her husband alone, with the accrued interest on both. Afterwards, on being pressed to do so by the appellee, Mary Hixon, she substituted for this last obligation the note and

Hetherington v. Hixon.

mortgage, the foundation of this suit, out of which the small note, above mentioned, was entirely omitted. The said acts of Mrs. Hetherington, as a *feme sole*, occurred after the appointment of an administrator *de bonis non* of the insolvent estate of her husband under a bond of \$20,000. The land mortgaged was her separate statutory estate.

Her execution of the note of her husband, as his surety, was inoperative, both because she was a *feme covert*, and it was without consideration. It, therefore, did not impose on her any obligation which would sustain its subsequent recognition. An illustration of the rule that a moral obligation does not form a valid consideration for a promise, unless the moral duty were once a legal one, is that the promise of a widow to pay for money expended at her request, or lent to her during her marriage, is void.—1 Parsons on Contracts, 361; *Wilkinson v. Cheatham*, Jan. term, 1871.

The case of *Vance v. Wells*, 8 Ala. 390, is not an adverse authority, because there the consideration and the obligation were concurrent. Besides, that decision may be referred to the principle of a married woman's power to bind her separate estate, which was destroyed by the law of the separate statutory estates of married women.—*Wilkinson v. Cheatham*, *supra*.

Mrs. Hetherington entered into this contract about five years after her husband's estate had been declared insolvent, and at the solicitation of the complainant, on her supposed existing liability. The insolvency of her husband's estate was positive, though not conclusive, evidence that she did not mean to purchase his notes, while the only indication that they were of any value is given by the appointment of an administrator *de bonis non*, under a bond of \$20,000.

While a note upon an insolvent person or estate may be a sufficient consideration for a promise to pay money, yet, where it was obtained, not as an inducement to the promise, but as a substitution of papers, and at the request of the promisee, the mere fact of loss subsequently sustained

on account of a failure to file it as a claim against the estate can not create a consideration, although the non-claim was in consequence of the creditor's belief that he had otherwise secured its payment.—2 Kent's Com. 465 ; *Mauil v. Vaughn*, January term, 1871.

As a note given for a pre-existing debt is not a payment or extinguishment of such debt, unless it was so agreed between the parties, and the taking of such a note does not even raise the presumption of payment or extinguishment ; so a note given for the debt of another is not a purchase of the debt, unless it was so agreed.—*Marshall v. Marshall's Ex'r*, 42 Ala. 149 ; *Mooring v. Mobile Marine Dock & Ins. Co.*, 27 Ala. 254. The complainants can not recover unless they can relieve their case from the condition of an obligation to pay the debt of another without an original concurrent consideration agreed to by the parties at the time.

The decree is reversed and the cause remanded.

CRAWFORD vs. TYSON, ADM'R.

[APPEAL FROM ORDER REMOVING EXECUTOR.]

1. *Statutes ; what must be construed in pari materia.*—The statute upon the removal of executors and administrators is *pari materia*, and must be construed together as one law.
2. *Executor, when may be removed without written application.*—Upon the removal of an executor or administrator from this State, the judge of probate of the county in which the letters testamentary have been granted, may, for this cause, proceed to remove him from his office of such executor or administrator, under § 2029 of the Revised Code, without an application in writing therefor.
3. *Executor, non-resident of the State ; how may be notified of proceedings to remove him.*—In such a proceeding, such non-resident executor or administrator may be notified by publication, under § 2022 of the Revised Code, of the proceedings against him, and a removal upon such

Crawford v. Tyson; Adm'r.

notice by publication is not void for want of sufficient notice. Publication is a proper mode of service of citation against a non-resident.—Revised Code, § 2022.

APPEAL from Probate Court of Lowndes.

Tried before Hon. J. V. McDUFFIE.

The facts are sufficiently stated in the opinion.

CLEMENTS, GILCHRIST & COOK, for appellant.

STONE, CLOPTON & CLANTON, *contra*.

PETERS, J.—This is an application of Charles A. Crawford, one of the heirs and legatees of Alfred Crawford, deceased, by petition to the judge of the probate of Lowndes county, to set aside a decree of said court removing William H. Crawford from the executorship of the estate of said Alfred Crawford, deceased. It does not appear that said decree was rendered on proceedings “instituted by any creditor, legatee, devisee, heir, distributee, or by any co-executor, co-administrator, or the sureties, or any of them.”—Rev. Code, § 2019. But it was instituted by the judge of probate himself upon the ground that said William H. Crawford, said executor, had removed from this State after his appointment as such, and had failed to make settlement of his said administration of said estate. The order or decree of removal recites that—“It being shown to the court that William H. Crawford, the executor, named in the will of Alfred Crawford, deceased, and who qualified as such, has removed from the State of Alabama and become a resident of the State of Texas, and that the said William H. Crawford has failed to make settlement of his said administration of said estate, and notice having been given of this proceeding for three weeks, by weekly insertions in the ‘Haynesville Examiner,’ a newspaper published in Haynesville in said county of Lowndes, &c.” On this notice the removal was made. There was no citation issued to said executor to appear and answer the application for removal, or to show cause why said executor should not be removed. At the hearing

it was proven to the satisfaction of the court that said executor had removed from the State of Alabama and become a resident of the State of Texas, "in which last named State he still resides." He was then removed, and Tyson, the general administrator of the county, was appointed administrator *de bonis non* of said estate in his stead. The court refused to set aside said order or decree of removal, and the plaintiff in the motion appeals to this court.

The statute upon the subject of the removal of executors and administrator must be taken as a whole and construed together as one law. It is all in *pari materia*. Such is the rule of construction for such statutes.—Bac. Abr. statutes 1, 3. The Revised Code declares, that "whenever the judge of probate has reason to believe that any just ground or cause of removal exists, or that an additional bond should be required of an executor or administrator, such judge may cause a citation to be served on him, requiring him to appear on a day therein named, five days after service thereof, and show cause why he should not be removed or give additional bond, as the case may be."—Revised Code, § 2029. This statute clearly gives the judge of probate authority to proceed without an application in writing when the facts are such as may justify him to proceed. This is the rational meaning of the language used. It is true that it also indicates the mode of procedure. But if the court is confined to the mode there indicated, in many instances, the judge might not be able to discharge the important duty thus conferred upon him. The language of the section is, that the judge, upon the existence of the proper state of facts, "may cause the citation to be served on" the delinquent executor or administrator. This does not seem to exclude all other modes of citation, particularly when it is construed in connection with sections 2021 and 2022 of the same act. The latter section prescribes that, "If such executor or administrator is not an inhabitant of the State or is absent therefrom, upon such fact being shown, by proof satisfactory to the judge, he must direct notice of such application to be given by publication in some newspaper, published in the county,

Bryant v. The State.

for three successive weeks.”—Revised Code, § 2022. Under this section of the Code, the judge acted, in giving the notice in the proceedings under discussion. I think the purpose and language of the whole statute justified him in doing so. This was a legal mode of service of citation. Non-residence was a sufficient cause of removal.—Revised Code, § 2017. This existed and justified the action of the court. And the only means of giving the executor notice was by publication. The order of removal was then not a void decree. All was done, that could be done, to bring the executor into court, and his removal was clearly justified by the facts. And had he been notified he would not have been retained. After his removal from the State he was not competent for the office of executor in this State.—Revised Code, § 1975. He, therefore, has no reason to complain. The removal is error without injury, if error at all, as to him.

The action of the court below is free from error. Its judgment is therefore affirmed, at appellant's costs.

BRYANT *vs.* THE STATE.

[INDICTMENT FOR RETAILING WITHOUT LICENSE.]

1. *Carrying on business of retailer ; what does not constitute.*—An indictment under § 111 of the Revenue Act of 1868, for being engaged in or carrying on the business of a retailer in spirituous liquors, &c., without license, is not sustained by evidence of a single sale of three pints of whisky by the defendant, who was a farmer and carpenter, without proof also of intention.

APPEAL from Circuit Court of Henry.

Tried before Hon. J. McCaleb Wiley.

The facts appear in the opinion.

SEALS & WOOD, for appellant.—The indictment is framed under the revenue law of 1868. It is insufficient in not averring that the business was engaged in since the third Monday in March, 1869, § 111 of revenue law of 1868, (Acts 1868, p. 330.)

2. The proof shows that the whisky was sold on only one occasion, and that selling whisky was not the vocation of the defendant. No conviction could be had upon this testimony.—See *Moore v. The State*, 16 Ala.; *Carter v. The State*, 44 Ala., and cases there cited.

ATTORNEY-GENERAL, *contra*.

B. F. SAFFOLD, J.—The appellant was indicted under § 111 of the revenue act of 1868, for being engaged in or carrying on the business of a retailer in spirituous, vinous or malt liquors, without having paid for and taken out a license to engage in and carry on said business, and was convicted.

The proof was that he was a farmer and carpenter, and that on one occasion, only, he had sold three half pints of whisky. He had not obtained any license. The offense charged is altogether different from that described in Revised Code, § 3618. A retail dealer in liquors is one who sells in less quantities than a quart. § 112, 4 Revenue Act, 1868. But one act of selling would not constitute engaging in or carrying on the business, unless an intention to do so concurred with it. Such an intention was not shown in this case, but rather the contrary. The charge of the court was therefore erroneous. *Carter v. The State*, 44 Ala. 29.

The judgment and sentence of the court below are reversed and the cause remanded.

SIMMONS *vs.* FIELDER & SESSIONS.

[ATTACHMENT FOR RENT BY ASSIGNEE OF LANDLORD AGAINST SUB-TENANT.]

1. *Lien on crop for rent, when vendee has.*—The purchaser of rented land who takes an assignment of the contract of rent, has a lien on all the crops grown on the rented land for the current year, by whomsoever made, whether by tenant or under-tenant.
2. *Same; how enforced.*—This lien may be enforced by process of attachment against the tenant, when the covenant or agreement of lease runs with the land, or when the lease has been assigned to the purchaser.
3. *Same; when can not be enforced.*—But it can not be enforced against the under-tenant by suit against him, founded on the contract of rent made by the tenant with the landlord before the sale.
4. *Same; how enforced by vendee against under-tenant.*—If the under-tenant is sued, he must be proceeded against on his contract with the tenant, and the purchaser must show that the same has been transferred or assigned to him. It does not pass by operation of law upon the sale of the premises to the purchaser.

APPEAL from Circuit Court of Bullock.

Tried before Hon. J. McCaleb Wiley.

This is an action for rent, commenced by attachment, in the names of the assignees of the landlord against the under-tenant of the lessees. The facts may be briefly stated as follows: In December, 1866, Briers, the owner of a tract of land in this State, rented the same to Scott & Sanders for one year, by contract in writing. And Scott & Sanders sub-let a part of the same land to Simmons, the appellant, who was the defendant in attachment in the court below. After this, and before the termination of the year for which Scott & Sanders had rented said land, Briers sold said land to Fielder & Sessions, and assigned to them the contract of Scott & Sanders for the payment of the rent to him, as above said. But there was nothing done as to the contract of Simmons for payment of the rent on the land sub-let to him by Scott & Sanders. So far as the proofs show, this was left as it was made, Scott

& Sanders were not sued in this action, and there was no evidence that Simmons' contract for rent had been assigned or transferred to the plaintiffs below. On the trial there was a judgment against Simmons for \$189.08, beside costs. From this judgment Simmons appeals to this court.

STONE, CLOPTON & CLANTON, for appellants.

WOOD & SEALS, and ARRINGTON, *contra*.

(No briefs came into the hands of the Reporter.)

PETERS, J.—At common law, the rights and liabilities of landlord and tenant are not confined to the immediate parties to the contract of lease; but they attach to the persons to whom the estate may be transmitted or who may succeed to the possession of the premises, either as landlord or tenant. This rests upon the principle of the privity of estate, which is incident to the relation of landlord and tenant. It is said that the land itself is the principal debtor, and the owner is the creditor, and the agreement to pay rent is a mere incident of this relation. The liability to pay rent, therefore, follows the land, upon which it is chargeable, into the hands of the assignee; and he takes the land with all the advantages to be derived from the agreement of the grantor concerning it, and he assumes all the burdens resulting from the covenants or agreements of the grantee.—*Van Renssalaer v. Bonesteel*, 24 Barb. 365; *Norman v. Wells*, 17 Wend. 145; Taylor, Landlord and Tenant, §§ 260, 261. But this rule only applies to parties who are the landlord and the tenant. But it does not apply to an under-tenant, or the tenant of a tenant. The under-tenant incurs no responsibility to the landlord of the tenant, except that imposed by the statute of "attachment for rent;" which makes all the crops grown on rented land liable for the rent for the current year. This liability may be enforced by attachment or by execution against the tenant. But neither the tenant nor the under-tenant is subject to be sued, except on his own contract. Generally, the tenant's contract passes by operation of law to the

assignee of the land, and suit may be instituted on it by the assignee of the land against the tenant for this reason. But this is not the case with the contract of the under-tenant. There is no privity of contract between the under-tenant and the landlord of the tenant or his assignee. And before the landlord can sue the under-tenant on his contract of rent, it must be transferred or assigned to him by the tenant, so as to make him the party really interested therein.—Rev. Code, §§ 1838, 2523, 2961; Taylor, Landlord and Tenant, § 448; *Quackenboss v. Clark*, 12 Wend. 555; *Webb v. Russell*, 3 Tenn. R. 393; *Demarest v. Willard*, 8 Conn. 206; 1 Saunders, 140a; *Henley v. Bush*, 33 Ala. 636.

Notwithstanding this, there can be no doubt that the landlord or his assignee, who stands in his shoes, has a lien on all the crop grown on rented land, for rent, for the current year, whether such crops are made by the tenant or the under-tenant or by a trespasser, and he is entitled to process of attachment for the recovery of the same. But the attachment must be issued against the tenant, and not against the under-tenant, unless the contract for rent of the under-tenant has been assigned or transferred to the plaintiff.—Rev. Code, §§ 2961, 2963, 1838; *Givens v. Easley*, 17 Ala. 385; *Hadden's Ex'r v. Powell*, 17 Ala. 314; *S. C.* 21 Ala. 745.

The evidence offered to the jury, on the trial below, does not prove the case alleged in the complaint. The court therefore erred in charging the jury, if they believed the evidence, they must find for the plaintiffs. The charge should have been just the reverse.

Let the judgment of the court below be reversed and the cause remanded.

CLARK *vs.* THE STATE.

[TRIAL OF DEFENDANT IN CIRCUIT COURT, ON STATEMENT BY SOLICITOR, AFTER DEMAND FOR TRIAL BY JURY MADE IN THE COUNTY COURT.]

1. *Indictment; when necessary for trial of misdemeanors transferred from county court to circuit court.*—Where a defendant, charged with a misdemeanor before the county court, demands a trial by jury, he is entitled to have the trial of the case transferred to the circuit or city court, and can then only be tried by indictment.
2. *Charge to jury; what erroneous.*—Where all the evidence is set out, and there is no proof of venue, it is error to refuse to charge the jury “that even if they believe the evidence they can not find the defendant guilty.” Such a refusal ignores the necessity of proof of venue.

APPEAL from Circuit Court of Barbour.

Tried before Hon. J. McCaleb Wiley.

The facts appear in the opinion.

JOHN A. FOSTER, for appellant.

JOHN W. A. SANFORD, Attorney-General, *contra*.

PETERS, J.—The appellant, said Clark, was arrested on a charge of assault and battery, and brought before the county court of Barbour county for trial, at the January term of said court in 1871. On being arraigned the accused demanded a trial by jury; and, thereupon, he entered into bond, as required by law, for his appearance at the next term of the circuit court of said county of Barbour, to answer said charge.—(Rev. Code, §§ 4031, 4047.)

The accused appeared in the circuit court as required by his bond, when he was put upon his trial, on a charge in the following language—that is to say:

“The State of Alabama,	}	In the Circuit Court,
Barbour county.	}	Spring term, 1871.

Brought from the County court.

The State of Alabama, by its solicitor, complains of

Clark v. The State.

Berry Clark, that within twelve months before the commencement of this prosecution he did assault and beat James Sims, against the peace and dignity of the State of Alabama.

A. V. LEE,
Solicitor of Barbour county."

To this charge, thus made, the accused pleaded not guilty, and was tried by a jury, and convicted and fined twenty-five dollars. And a judgment was thereupon rendered, as required by law. From this judgment the accused appeals to this court.

On the trial in the circuit court, there was a bill of exceptions taken by the defendant below. From this it appears that there was no indictment found by the grand jury against the defendant in the court below, and that he was tried, without objection, on the statement made by the solicitor as above quoted. The trial was by a jury. On the trial the proceedings had before the county court were read by the solicitor for the State to the jury without objection, and "the State then proved that the defendant assaulted and beat James Sims as charged in the statement of the cause of complaint signed by the solicitor." This was all the evidence. And upon this the defendant moved the court to charge the jury, in writing, that even if they believed the evidence they must find the defendant not guilty." This charge the court refused and the defendant excepted.

It appears from this proceeding, that the defendant was convicted in the court below upon a charge of assault and battery without indictment. This may be done when there is an appeal from a judgment of conviction on a trial in the county court.—(Rev. Code, §§ 4054, 4031.) But if there is no conviction in the county court and no appeal from such conviction to the circuit court, this cannot be done. The constitution of the State forbids that any person shall "be deprived of his life, liberty or property, but by due process of law."—Const. art. 1, § 8.) "Due process of law," means according to the law of the land.—(3 Story Const. 264, 661; *Murry's Lessee v. Hoboken Land & Insp. Co.* 18 How. 272; 2 Inst. 50, 276.) The law only authorizes the

county court, in the event that the accused demands a trial by jury, to bind him over to answer the charge in the city or circuit court of the county.—(Rev. Code, § 4047.) “All felonies, and all misdemeanors originally prosecuted in the circuit or city court are indictable offenses.”—(Rev. Code, § 4108) Indictment, then, is the only legal mode of proceeding, in such a case as this, in the circuit court. That court cannot proceed to apply the law in any other manner.—(Const. Ala. AA. 1, § 9.) A judgment in a criminal prosecution, except in trials before the county court, or on appeals from convictions in the county court, may be arrested, because the charge has not been made by indictment found by the grand jury.—Rev. Code, § 4146.) Here the charge was not made by indictment found by a grand jury as required by law. A conviction on such an indictment is erroneous.—(Comy. Dig. Indictment N.)

The bill of exceptions sets out all the evidence, and neither in it or in the record is there any allegation or proof of venue in this case. The refusal to charge the jury that “even if they believed the evidence they could not find the defendant guilty,” was erroneous, because it ignored the necessity of the proof of venue.—(*Brown v. The State*, 27 Ala. 47 ; *Sweeney v. The State*, 28 Ala. 48 ; *Spaight v. The State*, 29 Ala. 32.) The proof does not show that the offense was committed in the county or district in which the trial was had. This is necessary.—(Const. Alabama, art. 1, § 8.)

Let the judgment of the court below be reversed and the cause remanded. But the appellant, said Berry Clark, will be held in custody until discharged by due course of law.

[NOTE BY REPORTER.—On the authority of this case, the judgment in the case of *McGawin v. The State*, was reversed and cause remanded, &c.]

LEHMAN BROTHERS *vs.* SKELTON.

[ACTION TO RECOVER STORAGE OF COTTON.]

1. *Cotton stored in warehouse; purchaser of, for what storage liable.*—A purchaser of cotton stored at a warehouse is personally liable for the storage accrued during his ownership, though such ownership be unknown to the warehouseman. But he is not liable for storage charges accrued prior to that time, unless there is an agreement to that effect.

APPEAL from Circuit Court of Montgomery.

Tried before Hon. J. Q. SMITH.

THIS was an action brought by appellee against appellant, in the year 1866, to recover storage on nineteen bales of cotton from 1st of February, 1862, to 5th of April, 1865. The appellee was lessee of a warehouse in Tuscaloosa, Alabama, from 1st February, 1862, to 1st April, 1865, and in February, 1862, persons other than the defendants (appellants) stored the cotton with him, and he kept it stored from that time until the 5th of April, 1865, when both the warehouse and cotton were burned by the United States troops. At the time of receiving the cotton, appellee gave the persons who stored it, receipts therefor. The terms of these receipts were, in substance, that the cotton was on storage with the appellee, subject to the order of the person to whom the receipt was first delivered by the appellee, or subject to the order of the bearer of the receipt, on payment of the customary warehouse charges and all advances.

The appellants were owners of the cotton, and held the receipts therefor at the time the warehouse and cotton were destroyed, but at what time or in what manner they became the owners is not shown; their ownership was not known to appellee until some time after the destruction of the cotton, when appellants sent an agent to look after it, who showed the receipts for the cotton and asked its delivery.

When the account was presented to appellants they declined to pay, "as they were warehousemen themselves, and being largely interested, wished to test the question, whether the cotton itself was alone bound for storage, or whether the owner was bound." It was proved that the charge for storage was reasonable, &c.

The court charged the jury, in substance, that if they believed that the cotton was stored [as hereinbefore set out] and that the charge for storage was reasonable, &c., they must find for the plaintiff, and that the destruction of the cotton by fire after the account accrued could not affect the plaintiff's right to recover.

To the giving of this charge, the defendant excepted, as also to the refusal of the court to give the following charges, asked in writing :

"If the jury believe, from the evidence, that all the cotton stored, for the storage of which the plaintiff seeks a recovery in this action, belonged to other persons than the defendants at the time it was stored with the plaintiff, and that none of said cotton belonged to defendants when it was stored with the plaintiff, and that none of said cotton was received on storage by the plaintiff from defendant, and that all of said cotton was received on storage from persons other than the defendants, and these persons were, at the time of the storage with plaintiff, owners of the cotton, and if defendants have never made any promise to pay plaintiff for the storage of any of said cotton,—then the jury should find for the defendants." 2d. "The plaintiff can not recover of defendant any storage which accrued before they became the owners of the cotton on which the storage did accrue, unless defendants either stored the cotton with the plaintiff, or promised to pay storage to the plaintiff." 3d. "If the jury believe the evidence, they should find for the defendants."

The jury found a verdict in favor of the appellee (plaintiff) for the amount of the account and interest, and judgment was rendered accordingly.

RICE, SEMPLE & GOLDTHWAITE, for appellants.

A. B. CLITHERAIL, and M. D. GRAHAM, *contra*.

Ex parte Bottoms.

B. F. SAFFOLD, J.—Is the purchaser of cotton stored in a warehouse by the vendor, which he suffers to remain there after his purchase, personally liable for the storage due thereon, there being no express promise on his part to pay, and the warehouseman not even knowing that he was the owner until he demanded the cotton?

There is undoubtedly an implied promise on the part of the owner of property, which is on storage with his knowledge and consent, to pay a reasonable storage. He knows that the service is not gratuitous, and he expects to enforce against the warehouseman any liability he may incur for damages. He accepts the service when rendered, and retains the benefit.—1 Parsons on Contracts, 405.

The defendants are not liable for the storage accrued prior to their purchase, unless there was an agreement to that effect. There is no virtue in a mere sale of property, though there be a lien upon it, capable of transferring the personal indebtedness of the vendor to the purchaser.

There is nothing in the transcript tending to show whether the recovery was for a longer time than the ownership of the defendants.

The judgment is affirmed.

EX PARTE BOTTOMS.

[APPLICATION FOR MANDAMUS.]

1. *Mandamus; when will not be granted.*—After the circuit court has heard a motion to quash an attachment, and to strike the same from the docket, because the affidavit does not disclose any cause of action, or a cause of action, for which an attachment is authorized to be issued, and also because the action is discontinued, and after argument, &c., overrules the motion and enters judgment accordingly, a mandamus will not be issued to compel said court to grant said motion—the remedy, for any error of the court in overruling the motion, is by appeal, after final judgment, and not by mandamus.

This was an application to this court by the petitioner, Burrell Bottoms, for a mandamus or other appropriate writ to compel the circuit court of Barbour, Hon. J. McCaleb Wiley, judge presiding, to grant a motion made in that court and overruled, to quash the attachment issued in the cause of *Russell v. Bottoms*, and to strike the cause from the docket, on the ground that the action had been discontinued, and because the affidavit for attachment did not disclose any cause of action for which an attachment could lawfully issue.

From the bill of exceptions it appears that Russell made two affidavits for the issuance of the attachment, both on the same day, to-wit: the 18th day of November, 1865, and the second being referred to in the first as a special affidavit, and before the attachment issued. This last affidavit states in substance, that Burrell Bottom is justly indebted to him, &c. in the sum of \$600, as damages for breach of two contracts, as follows: that on 21st day of January, 1865, said Russell purchased of Bottoms 5,000 lbs. of seed cotton and paid Bottoms therefor \$650, and in consideration of said payment Bottoms executed a written agreement acknowledging the sale and payment and his obligation to deliver said cotton to Russell at any time between 21st January, 1865, and the 25th of December, 1865, and has refused to deliver any of said cotton or any part thereof, but has fraudulently disposed of the same. Then follows the same allegation as to a similar contract, purchase and payment for 5,250 lbs. of seed cotton to be delivered on the 25th of December, 1864, of which 5,196 lbs. have been delivered, and that said Bottoms refused, after demand, to deliver the balance of the cotton, 54 lbs., but sold it to these persons, and has fraudulently disposed of the same. Then the affidavit goes on to state—"and the said Wm. M. Russell avers that by the breach of the two agreements before stated and the fraudulent disposition of said cotton, he is damaged to said sum of \$600." The affidavit contained the usual requirements of the statutes, that the attachment was not sued out for the purpose of harrassing or vexing the defendant, &c.

Ex parte Bottoms.

This attachment was levied on certain personal property of Bottoms, on the 20th of November, 1865, at which date the cause was entered on the appearance docket of the spring term 1866, when John Bottoms interposed a claim, &c., which was duly returned and entered on the appearance docket of the spring term 1866. And neither were entered on any other docket until the spring term 1866, and the only entry then upon any of the dockets was upon the trial docket, as follows:

“William M. Russell

10624.

vs.

Burrell Bottoms, def't.

John Bottoms, claimant.”

This entry was continued in the same number and carried forward on the trial docket for every term thereafter until the January term 1868, when there was a trial of the right of property and a verdict for claimant, which was set aside and a new trial granted. These proceedings were entered in short form by the judge opposite the entry on the docket. Up to that time no complaint had been filed and no other entry made on the minutes or on any docket of the court, except as above stated, and no judgment had been obtained against either said Burrell or said John Bottoms. At the fall term 1870, the motion of the defendant theretofore regularly made and continued to quash said attachment and repudiate the cause and to strike the same from the docket for the reasons already mentioned, came on to be heard and was overruled, and defendant excepted. The defendant, Burrell Bottoms, then moved the court to dismiss the cause, because no complaint had been filed in the case either before or after the return of said attachment. On motion of plaintiff, leave was then given him to file a complaint, and thereupon the court overruled the motion to dismiss the cause, and Bottoms excepted.

SAMUEL F. RICE and JERE. N. WILLIAMS, *pro motion*.—Whenever there is a wrongful refusal of a circuit court to dismiss a suit, mandamus is the remedy, unless and until final judgment has been rendered therein. After final

judgment, appeal or writ of error is the remedy; and mandamus is not, because "the final judgment in the suit can not be reversed by mandamus, nor on an application for mandamus." This is fully settled by this court and by the supreme court of the United States.—*Steamboat Empire v. Alabama Coal Mining Company*, 29 Ala. Rep. 698; *Gordon v. Langest*, 16 Peters, 97.

If, before final judgment, mandamus will lie for the refusal of the circuit court to dismiss a suit for want of security for costs, *a fortiori*, mandamus will lie for the refusal of such court to dismiss a suit for want of jurisdiction, or for any other legal cause of dismissal. If the law were otherwise, there would be great oppression to private suitors as well as great detriment to the public in the accumulation of costs and expenses, and in the consumption of the time of the courts and jurors and people.

By section 5 of article 6 of our State constitution, the circuit court has jurisdiction "in civil cases *only*, when the matter or sum in controversy exceeds fifty dollars." An original attachment is unknown to the common law, and the mere creature of our statute. The statute (Revised Code, § 2927) does not authorize or permit such attachment before the maturity of the demand, but "in one class of cases"; and that is when it is sued out "to enforce the collection of a debt. In all other cases, a right of action must have accrued, by the terms of the contract, or the nature of the transaction itself, before the right to an attachment to enforce any demand arising therefrom, can exist." *Bozeman v. Rose*, 40 Ala. R. 217, 218.

In defiance and contempt of this provision of the constitution and of this clear law, the attachment here complained of was issued to enforce a demand, not for "a debt," but for damages claimed to result from the breach of two contracts to deliver cotton; it was issued before there was any breach of one of the contracts, and at a time when only about five dollars worth of the cotton embraced by the other contract remained undelivered or due. These facts are shown in plaintiffs own affidavits, which refer to each other and must be construed together and as one. And

as these facts thus are admitted by plaintiffs, no plea was necessary to re-assert them ; but the motion to quash and dismiss was proper.—*McLeod v. Reid & Co.*; 20 Ala. R. 576.

SHORTER, SEALS & COCHRAN, *contra*.

PECK, C. J.—In the case of *Ex Parte Robins*, 29th Ala. 71, it is decided that a suit commenced by attachment, by a non-resident, is within the statute, Revised Code, § 2802, which requires security for the costs to “be endorsed on the complaint, or lodged with the clerk, previous to the issue of the summons,”—and the same case decides that, “if the circuit court refuses, *on motion*, to dismiss a suit brought by a non-resident, without first giving security for the costs, mandamus lies to compel its dismissal.”

We apprehend that decision would not have been made if the statute had not declared, that a suit commenced by a non-resident, without giving security for the costs, *must be dismissed on motion*.”

The statute provides how the suit is to be dismissed, to-wit: *by motion*. The defendant, therefore, is entitled to have it disposed of in that way. The defendant need not plead the matter in abatement, or if his motion to dismiss is overruled, wait to have the error corrected, after final judgment, as we think he would have to do if the statute did not expressly require the suit to be dismissed on motion. The statute providing not only what judgment shall be rendered, but also how it shall be rendered, to-wit: on motion, the defendant is entitled to the benefit of the statute in the way provided, and if it is denied in that way we know of no adequate remedy but mandamus. If he should be compelled to wait till final judgment, and then seek a remedy by appeal, he would not only be delayed in his remedy, but would altogether be denied the remedy given by the statute.

Ordinarily, a judicial error cannot be corrected by writ of mandamus. That writ is the appropriate writ to compel subordinate courts to proceed and determine causes before them, but it does lie to compel a judicial tribunal to render

any particular judgment or to set aside a decision already made.—*Ex parte Koon et al.*, 1 Denio, 644; *Moses on Mandamus*, 36.

The original proceedings upon which this application is based, were commenced by an attachment in favor of W. M. Russell against Burrell Bottoms, issued by a circuit judge on the first day of November, 1865, returnable to his court, and two days afterwards was levied on the property of the defendant, Burrell Bottoms, the petitioner in this behalf. Five years afterwards, at the fall term of the circuit court, 1870, the bill of exceptions taken in that case, states that the motion of the defendant, theretofore regularly made and continued, to quash said attachment and repudiate the cause, and to strike the same from the docket for want of jurisdiction in the court of the cause, apparent on the face of the affidavits and attachment, and because said cause was discontinued, even if the court had jurisdiction of it, came on to be heard, and after argument by the parties the court overruled said motion and the defendant excepted, &c. After said motion was thus overruled, said Burrell Bottoms, on his petition, applied to this court at the last term for a mandamus to compel said circuit court to grant said motion to quash said attachment and to repudiate said cause and to strike the same from the docket, &c.

If it be conceded that said judgment overruling said motion is erroneous, the error cannot be corrected by the writ of mandamus; the remedy is by appeal, after final judgment in the cause. In denying a mandamus it is not necessary to decide whether the motion should or should not have been granted, or whether the facts stated in the affidavits disclose any cause of action, or if they do, that it is such a cause of action as authorized the process of attachment; but, it seems to us, the affidavits, although very artificially drawn, if true, show not only a good cause of action, but a good cause for the attachment. They state that the plaintiff in the attachment, had bought certain cotton of the defendant, the petitioner, and at the time of the purchase paid him the price in money, and by the agreement of the parties the vendor was to deliver the

Marshall v. Howell et al.

cotton by a certain future day, and that before that day he sold the cotton to a third person. This conduct of the vendor authorized the vendee to rescind the contract and treat the same as at an end, and to sue presently to recover back the money. He was not obliged to wait until the day the cotton was by the agreement to be delivered.—2 Parsons on Contracts, 666–67 and note c. Said affidavits also state that said Burrell Bottoms had fraudulently disposed of his property, and that an attachment was not sued out for the purpose of vexing or harrassing said Burrell Bottoms, &c. These statements we think clearly entitled the vendee to the aid of an attachment. If the said affidavits are defective in form, § 2990 of the Revised Code permits their amendment. For these reasons the application for a mandamus must be denied, at petitioner's cost.

MARSHALL vs. HOWELL ET AL.

[BILL IN EQUITY TO FORECLOSE MORTGAGE.]

1. *Answer required and made under oath; what not overcome by.*—The answer of a defendant to a bill in chancery when required on oath, and responsive, is not overcome by the testimony of the complainant as a witness.
2. *Decree in chancery on facts of case; when only will be reversed.*—A decree of the chancery court on the facts of a case, will not be reversed unless decidedly contrary to the weight of evidence.

APPEAL from Chancery Court of Perry.

Heard before Hon. A. W. DILLARD.

The facts are sufficiently stated in the opinion.

BROOKS & HARALSON, for appellant.

JOSHUA MORSE, *contra*.

(No briefs came into the Reporter's hands.)

B. F. SAFFOLD, J.—The appellant filed his bill to foreclose a mortgage on a certain tract of land which the appellee, Howell, had given him to secure the payment of a note for about \$1,025. He averred that no more than \$300 had ever been paid on the debt, and that a large sum of money was still due, and that C. C. Johnson, whom he made a defendant, was in possession of the land, claiming some interest therein. The defendants were required to answer on oath touching each averment.

Johnson answered in substance that he had bought the land from Howell, with the complainant's consent, for a larger sum than was due on the mortgage; that he gave a written obligation, with personal security, to pay the mortgage debt to the complainant and the remainder to Howell, and that this obligation was given to and received by the complainant as an extinguishment of the mortgage; that he had paid \$800 to the complainant and \$200 more to Howell, with the said complainant's consent, all of which was intended by the parties as a credit on the amount due the plaintiff.

The complainant, as a witness in his own behalf, testified to the payments stated by the respondent, but denied that more than \$300 was paid on his account. He insisted that the other sums were paid to Howell on his own account. A decree *pro confesso* was taken against Howell, and a decree in favor of the defendant Johnston was rendered on the merits of the cause.

The right of the parties depends on the weight of the evidence. The answer is responsive to the bill. The respondent was required to answer an averment of how much had been paid on the mortgage debt and what amount was still due. He says there is nothing due, and tells why. The written obligation given by Johnston and his surety was peculiarly drawn. It recited that on the first day of January next they were to pay to Howell the balance of money due after paying the amount of Howell's indebtedness to Marshall, for a certain tract of land, &c. This

Dugger v. Tayloe.

writing was received and held by Marshall, though he does not seem to have given up his note on Howell. There was no positive inconsistency in this, because he may have retained that note to show the amount due to him. He was cognizant of the payments he says were made to Howell, but his debt had precedence, and he had manifested no great inclination to wait, as he had attempted to sell the land and failed for want of bidders. His testimony does not overcome the defendant's answer as evidence. The obligation of Johnston and his surety, and the disposition made of it, show an agreement with the complainant, of which Johnston's account is reasonable. Its meaning is not very lucidly expressed, but the most obvious interpretation is that Johnston and Bates bound themselves to pay Marshall's debt, and as much more to Howell as would amount to ten dollars an acre for the tract of land.

We are obliged to agree with the chancellor, that the balance of evidence is on the side of the defendant.

The decree is affirmed.

DUGGER vs. TAYLOE.

[ACTION OF EJECTMENT UNDER THE CODE.]

1. *Sale of land by decree of probate court; for what purpose parol evidence inadmissible.*—In an action for the recovery of land brought by the heirs of a decedent against a purchaser at a sale under an order of the probate court, parol evidence is inadmissible to prove the non-payment of the purchase-money, after a conveyance has been made by order of the court on the application of the purchaser under § 2096, Revised Code.
2. *Evidence; charge on effect of by court ex mero motu; when not reversible error.*—A charge on the effect of the evidence should not be given, unless at the request of one of the parties; but when it is clear that no injury has resulted, the judgment will not be reversed.

Dugger v. Tayloe.

APPEAL from Circuit Court of Marengo.

Tried before Hon. LUTHER R. SMITH.

The facts are sufficiently stated in the opinion.

BROOKS, HARALSON & ROY, for appellant.

LYON & JONES, *contra*.

(No briefs came into Reporter's hands.)

B. F. SAFFOLD, J.—The suit was in the nature of ejectment by the appellants against the appellee to recover land. The plaintiffs claimed title through Henry Dugger, who died seized and possessed of the property. They were his heirs-at-law, except Alice G. Dugger, who was a purchaser of the interest of one of the heirs. The defendant resisted on the ground that he was a purchaser at a sale made by the administratrix of Henry Dugger, under a decree of the probate court, and that the sale had been confirmed, and the purchase-money paid.

The evidence was that the administratrix of Henry Dugger applied by petition, duly verified, for a decree, ordering a sale of the land for distribution, on the ground that it could not be equitably divided without a sale. The decree was rendered on the 22d October, 1860, and the sale was made on the 19th of November, 1860, to Bocock. It was confirmed in April, 1861. In 1868, after the commencement of this suit, a conveyance was made to Bocock by a person other than the administratrix, on his application, under § 2096, Revised Code. It was admitted that prior to this conveyance the purchase-money was paid, and distributed amongst the heirs and distributees.

The plaintiffs offered the testimony of Alice G. Dugger, who had been the administratrix, to prove that in 1863, when the purchase-money was said to have been paid, three of the plaintiffs were under twenty-one years of age, and that the last note, due in 1863, was paid to her in Confederate currency, which she was induced to take by threats, misrepresentation and duress. This the court excluded.

Dugger v. Tayloe.

The foregoing being in substance all the testimony, the court charged that if the jury believed the evidence, they must find for the defendant. The errors assigned are the exclusion of the testimony of Alice G. Dugger, and the charge of the court.

The land was sold under a decree founded on a proper petition, and the sale was confirmed. The court, on the application of the purchaser, ordered a conveyance to be made to him, and, in so doing, necessarily determined that the purchase-money had been paid. It is true, no notice of this application was given to any person interested. The statute makes no provision for notice. It seems merely to confer on the purchaser a right to apply for what he is entitled to, if the administrator should be tardy in his duty. No notice is required when the administrator reports the purchase-money paid, and asks for leave to make title. It is the duty of the court in either case to be satisfied that the money has been paid, before it authorizes a conveyance to be made.—Rev. Code, § 2228.

It is manifest that the title of these plaintiffs has been divested by a court of competent jurisdiction, after cognizance obtained. It can only be restored in equity on the grounds for which judgments may be impeached. To admit parol evidence to negative the adjudication otherwise would lead to inextricable confusion.—*Deslonde v. Darrington*, 29 Ala. 92. There was no error in excluding Mrs. Dugger's testimony.

The charge given by the court, on the effect of the evidence, does not appear to have been asked by either of the parties. Such a charge is forbidden to be given.—Revised Code, § 2678. There is no necessity for it, because the jury will be apt to perceive the right when the evidence is so entirely on one side as to justify the charge. In this case the evidence was of such a character that its proper interpretation to the jury necessarily involved a declaration of its effect. There was, at most, only error without injury. *Hill v. The State*, 43 Ala. 335.

The judgment is affirmed.

RYAN, TRUSTEE, *vs.* BIBB ET AL.

[TROVER FOR CONVERSION OF MULES, &C.]

1. *Husband, conveyance of to trustee for wife ; what title confers on trustee.*
A *bona fide* conveyance by the husband to a trustee for the use of his wife of property purchased by him chiefly with funds of his wife, received from her guardian, the title to which he took in his own name, made in consideration of such funds so received and appropriated by him, confers on the trustee such an interest in the property as will enable him to maintain trover for its conversion.

APPEAL from City Court of Montgomery.

Tried before Hon. JOHN D. CUNNINGHAM.

On the 20th day of November, 1867, Vernon Henry Vaughan, made a conveyance, which recites that on the 15th day of October, 1862, said Vaughan had received \$8,000 in Confederate money, which was a part of the separate statutory estate of his wife, Cornelia, which he had employed in various investments, treating them as his own, and then held in his own name ; that most of said investments, and the property conveyed, were derived from the use of money which was of right the separate statutory estate of his wife ; that, therefore, at his wife's request he thereby conveyed certain mules, &c., and some real property, particularly described in the deed, "unto R. B. Ryan, to have and to hold unto said R. B. Ryan in trust for said Cornelia D. Vaughan, her heirs, administrators, and assigns forever, to be held and enjoyed by her in all respects as her separate estate under the laws of Alabama." This deed was duly attested, acknowledged and recorded on the day it bears date, and on the same day Ryan accepted the trust, and assumed the management and control of the property mentioned in the deed. At the time of the making of the deed, the mules mentioned were in use on a plantation cultivated by Vaughan, near the city of Montgomery, and in charge of his overseer. Vaughan, who

lived in the city of Montgomery, had several times pointed out the mules to Ryan, and spoke of them as his wife's mules and acknowledged them as hers, and frequently conferred with Ryan about their management and the best use to put them to, and had the use of them by the consent of Ryan. Shortly after this, about the 1st of January, 1868, the sheriff of Montgomery county, at the instance of defendants, who had given him an indemnifying bond, levied upon the mules mentioned in the conveyance while they were on Vaughan's plantation, and sold them after a demand by Ryan, and notice of his title, under an execution issued against W. C. Bibb, J. F. Jackson and Benajah S. Bibb. It was proved that the recitals in the deed were substantially true.

Ryan, as trustee, having brought an action of trover for the conversion of the mules, offered to read in support of his title the deed above recited, in connection with proof that the mules converted by the sheriff were the same as those mentioned in the deed; but the court refused to allow it to be read, on the ground that it was void on its face and did not convey title to the plaintiff. The evidence in the case being in substance as above set out, the court charged the jury that if they believed the evidence they must find for the defendants, and plaintiff excepted, and hence this appeal.

WATTS & TROY, for appellant.—The court supposed the effect of the deed made it one executed by a husband to his wife, and that, as husband and wife could not contract with each other, the deed was void at law. But this is not so. This deed evidenced a contract between plaintiff and Vaughan, the maker of the deed, and was not a contract between Vaughan and his wife. That the court erred in excluding such a deed is made more than manifest by the following authorities.—*Elliott et al. v. Horn*, 10 Ala.; *Wilson v. Shepperd*, 28 Ala. 623; *Goree v. Walthall*, 44 Ala. 161; *Tucker v. Moreland*, 10 Peters, 67.

A husband has a right, when he pleases, to make a gift to his wife of land or personal property: If he make a deed directly to the wife, the deed at law would be void,

because he and his wife being one person, in law, can not make a contract ; because it requires two persons to make a contract. But such deeds have always been upheld in equity. But a deed by a husband to a trustee, for the benefit of his wife, has never been held void, unless it be made to hinder, delay or defraud his creditors.

But, in this case, there is no creditor of Vaughan complaining. What right had the sheriff with such an execution to levy on the property of Vaughan. He was a mere trespasser. Being a mere trespasser, he and his co-trespassers had no right to make objection, even to Vaughan conveying his property to Ryan for the use of Vaughan's wife.

2. The proof offered, and that which was introduced, showed that Ryan was in the actual possession of the mules sued for at the time they were seized by the sheriff, under an execution against Bibb and others.

There was no proof tending to show that Bibb or either of the defendants in execution had ever owned any of the mules sued for. The whole proof in the record shows that the plaintiff was entitled to recover the value of the mules.

3. The whole evidence authorized the court to give the charge asked by the plaintiff, and required the court to refuse that asked by the defendants.

FITZPATRICK & WILLIAMSON, and ARRINGTON & GRAHAM, *contra*.—The deed from V. H. Vaughan to Ryan recites the receipt by Vaughan of the money for his wife ; that the property described in the deed was “mainly the result of the investment of said sum of money,” and that “the said property of right is the separate estate of my wife.” These recitals were an admission of the title of Mrs. Vaughan, made by Vaughan, while the property was in his possession, which was good against Ryan.—*Gillespie's Adm'r v. Barleson*, 23 Ala. R. 551; *Brewer v. Logan*, 19 Ala. R. 481; *Fontaine v. Beers & Smith*, 19 Ala. R. 722; *Barnes v. Mobley*, 21 Ala. R. 232.

In the absence of any other proof, this admission was

Ryan, Trustee, v. Bibb et al.

conclusive that the property belonged of right to Mrs. Vaughan. If this was so, the legal title to the mules was already in her (no deed or other instrument in writing being necessary to vest the legal title to personalty,) and could not be conveyed to any one, except in the manner and for the purposes provided by the Code.

The deed to Ryan was only executed by the husband; was not a sale for re-investment, and was against the policy of the law, as it divested the husband of the character of trustee of his wife without a decree of the court of chancery.—*Wilkinson v. Cheatham*, January term, 1871.

The deed, therefore, conveyed no title to Ryan, and when offered to show title was properly excluded.

Ryan could only recover by virtue of constructive possession, under title in himself, or by proof of actual possession. There was no proof of title, except the deed excluded, and no proof of actual possession. The charge asked by plaintiff was, therefore, properly refused, and that asked by defendants was properly given.

On the case made by plaintiff, Mrs. Vaughan was the proper party plaintiff. A recovery by Ryan could not have been pleaded in bar of a suit by her.

B. F. SAFFOLD, J.—The appellant sued the appellees for the conversion of property, the legal title and possession of which he claimed as a trustee. In support of this claim he offered in evidence a deed from Vernon H. Vaughan to him, reciting that in consideration of eight thousand dollars of Confederate currency, the separate estate of his wife, Cornelia, received by him, the said Vaughan conveyed to the plaintiff in trust for his said wife certain real and personal property therein described, the title to which was in his own name, though it had been procured chiefly by his investment of the funds above mentioned. The property alleged to have been converted is a part of that described in the deed. This evidence was excluded, on the ground that so far from showing the right of the plaintiff to maintain the suit, it made apparent his want of title to the property. The plaintiff having, as a

witness in his own behalf, testified to the facts recited in the deed, the court charged, at the request of the defendants, that the jury must find for them, which was accordingly done.

The correctness of the action of the court is maintained for the appellees on the ground that the statute (Revised Code, § 2372,) vests in the husband, as her trustee, the property of his wife, and he can not by such a conveyance divest himself of that character, and confer it upon another. And further, that as husband and wife can not "contract with each other for the sale of any property," (Rev. Code, § 2374,) he can not do so even with the consent of his wife.

In many instances the only evidence of title to property is its possession, identity and the source whence it was derived. These will do unless another holds title deeds and papers which obscure, even if they do not repel, the rightful ownership. When this is the case the real owner has his right of action to establish his ownership. If the possessor of these muniments does voluntarily what the law would compel him to do, his action will be maintained. *Wilson v. Shepperd*, 28 Ala. 623.

Where the husband converts the *corpus* of his wife's property, using it in the purchase of property, the title to which he takes in his own name, he is her debtor.—*Jenkins v. McConnice*, 26 Ala. 213. The prohibition against contracts between husband and wife, in § 2374, Revised Code, introduced no new feature into the law governing the marital relation. Nor did the *quasi* trusteeship of the husband, created by § 2372, Rev. Code, limit her sources of receiving property. In *Lady Arundel v. Phipps*, 10 Vesey, 139, a purchase by a married woman from her husband, through the medium of trustees for her separate use and appointment was declared to be sustainable against creditors, if *bona fide*, though the husband be indebted at the time, and the purpose being to preserve from his creditors for the family the subject of the purchase, Lord Eldon declaring that the doctrine was not so either in equity or at law, that husband and wife could not after marriage contract for a

bona fide and valuable consideration for a transfer of property from him to her, or trustees for her.

Shall we deny the power of a husband to pay a debt due to his wife by a conveyance of his property to a trustee for her use, in order to preserve his trusteeship of her property? Section 2372, Rev. Code, refers only to such property as the husband may be trustee of, and does not forbid the acquisition by the wife of property of which he can not be her trustee. So, § 2372, Rev. Code, refers to contracts directly between them other than such as the law would compel him to make. The rulings of the court above mentioned were erroneous.

The judgment is reversed and the cause remanded.

CRUMBLEY *vs.* SEARCEY.

[ACTION ON PROMISSORY NOTE.]

1. *Plea; what demurrable.*—In a suit against one of the makers of a promissory note, a plea by the defendant that his co-maker was, at the time of making the note, a married woman and principal in said note, and that he signed it as her surety, is subject to demurrer. So, also, is a plea that the consideration of the note was the hire of a slave.

APPEAL from Circuit Court of Henry.

Tried before Hon. J. McCALEB WILEY.

THE appellant brought suit against appellee, on a promissory note made by him, and Mary McGee and Rebecca Searcey, who were not sued in the action. The appellee pleaded in short by consent—1st, “that he was only surety for Mary McGee, who was the principal in said note, and who, at the time of making said note, was a *feme covert* ;” and, 2d, “That the sole consideration of said note was the hire of a negro slave.”

The court overruled a demurrer to each of these pleas, and rendered judgment for costs against plaintiff, and this action is now assigned as error.

SHORTER & MCKLERoy, for appellant.

W. C. OATES, *contra*.

B. F. SAFFOLD, J.—In a suit upon a promissory note against one of the makers, a plea by the defendant that his co-maker was a married woman at the time, and that he signed it merely as her surety, is subject to demurrer. The obligation is several, as well as joint, and the plea of coverture is a personal defense.—*Gibson v. Marquis*, 29 Ala. 668; *Hall v. Canute*, 22 Ala. 650; 1 Parsons on Notes and Bills, 244; 30 Vermont, 122.

A plea, that the consideration of the note was the hire of a slave, is also bad.—*Mudd v. McElvain*, January term, 1870.

The judgment is reversed, and the cause remanded.

BOYD & JACKSON vs. THE STATE.

[INDICTMENT FOR SETTING UP AND CARRYING ON A LOTTERY, &C.]

1. "*The Mutual Aid Association*," act creating; what it authorizes.—The act of the general assembly of this State, approved December 10, 1868, creating the Mutual Aid Association, authorizes said association to set up and carry on a lottery such as is sanctioned by said act, and for the purposes therein named.—Pamph. Acts 1868, p. 263.
2. *Privilege granted by act of legislature, when not taken away by repeal*.—Said act confers upon the partners in said association, after the payment of the sum of \$2,000 into the State treasury, as required by the fourth section thereof, the privilege of setting up and carrying on a lottery, such as is authorized by said act, for one year, and a repeal of the act granting this privilege can not take it away during the time for which the payment has been made.—Pamph. Acts 1870-71, p. 217.

Boyd & Jackson v. The State.

3. "No one is permitted to take advantage of his own wrong;" to whom applies.—The first head-note in *Brent v. The State*, (43 Ala. 227,) repeated and affirmed; that "the State as well as an individual is bound by the maxim, that no one is permitted to take advantage of his own wrong."

APPEAL from the City Court of Montgomery.

Tried before Hon. J. D. CUNNINGHAM.

The facts appear in the opinion.

ELMORE & GUNTER, S. F. RICE, and JUDGE & HOLTZCLAW, for appellant.—1. If it be conceded that the Mutual Aid Association is a corporation, it is plainly a corporation "for municipal purposes," within the meaning of section 1 of article 13 of our State constitution; and therefore the act creating it is valid.—*Horton v. Mobile School Commissioners*, 43 Ala. 607; *Gelpecke v. City of Dubuque*, 1 Wallace, 175, and cases therein cited.

2. But evidently the Mutual Aid Association is not a corporation; it is a partnership, and has the personality or "sort of personality" which belongs to every partnership. Par. on Partn. 171, 269. It is not "an artificial person," but simply a body of natural persons associated as "partners," to whom the power of "succession," (an essential of a corporation) is not given. The act creating the privileges of that partnership treats it only as a partnership. This fact, coupled with the well settled distinction between a corporation and a partnership, (so well stated in *Parsons on Partn.*) disables the courts from converting it into a corporation, in order to destroy it. For there is no plainer duty on courts than that of always adopting that construction of a statute (admitting of two or more constructions) which will make the statute valid and consistent with the constitution; "*ut res valeat magis quam pereat.*"—*Wammack v. Holloway*, 2 Ala.

The act of 1868, in relation to this partnership, belongs to that class of statutes which are "considered as propositions extended to private citizens." And when, as here, the propositions, as so made, admit of acceptance by payment of specified instalments, and are in fact accepted by the actual

payment of these several instalments, in plain compliance with the terms of the propositions, all the authorities agree, that a contract is thus made and consummated, which falls within the protection of paragraph 1, of section 10, of article 1 of the constitution of the United States, and can not be impaired by any subsequent legislative enactment. *Oliver v. Lee & Co.'s Bank*, 21 N. Y. 14; *The State v. Heyward*, 3 Rich. (S. C.) Law Rep. 389; *Rouse v. Home of the Friendless*, 8 Wallace.

The authority and right conferred by the act of 1868 upon the partners and their associates, upon their proved compliance with the provisions of that act, can not possibly be inferior to those which are acquired by obtaining a license in accordance with existing law. And the right of such license can not be impaired by subsequent legislation. *Phil. Ass'n, &c., v. Wood*, 39 Penn. State Rep. 73.

The repealing act of the last session is in plain conflict with the provision of the constitution of the United States above cited; it is also in conflict with our State constitution; it purports to destroy vested rights and privileges, paid for in advance of their exercise, without even offering to return any part of the money obtained therefor; its morality is as debateable as that of lotteries; it boldly deprives citizens of their "property" without due process of law, and by the mere arbitrary judgment of the legislature.

The doctrine laid down in *Brent v. The State*, (43 Ala. 227,) concludes and estops the State from indicting these defendants; and in order to sustain the judgment of the court below that well considered decision must be overruled.

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. It is conceded that the general assembly can not enact a law that impairs the obligation of contracts; and that this rule applies as well to contracts to which the State is a party, as to contracts between its citizens.—*Fletcher v. Peck*, 6 Cranch, 87, *et seq.*

2. But this provision of the constitution does not prevent such changes in the internal policy of the State as

may be deemed expedient by its legislature.—*Barlow v. Gregory*, 31 Conn. 261.

3. The license granted by the State to the defendants and their partners to establish and carry on a lottery, is not a contract, but a mere police regulation, and may be revoked by the State.—Acts 1868, pp. 263-4; *Presbyterian Church v. Mayor of New York*, 5 Cow. 538; *Hirn v. The State*, Ohio St. Rep. 15-21; *Freleigh v. State*, 8 Mo. 606; *State v. Hawthorn*, 9 La. 389; *Bransom v. The City of Philadelphia*, 47 Penn. St. Rep. 329.

4. The defendants were, in effect, the mere agents of the State in carrying on the lottery for the benefit of the school fund. They accepted the agency on the conditions mentioned in the act, and surely the State can discontinue or change her policy in regard to this matter without being obnoxious to the charge of infringing the Federal constitution. If the law had have authorized the sale of the lottery, and the privilege had been sold, the legislature could not have repealed the statute. But as long as it was in the possession of the original managers the act was repealable. *The State v. Phelan*, 3 Harrison, (Del.) 441; *Rector of Christ Church v. City of Philadelphia*, 24 Howard, 300.

PETERS, J.—The appellants, who were defendants in the court below, were indicted at the February term, 1871, of the city court of Montgomery, for setting up and carrying on a lottery without the legislative authority of the State. The indictment was returned into court on the 17th day of March, 1871. On the trial below, the defendants were found guilty and fined one hundred dollars. For this sum, and costs, judgment was properly rendered. And from this judgment the defendants appeal to this court.

There was a bill of exceptions taken by the defendants on the trial in the court below. From this, it appears that the defendants set up in their defense a certain act of the general assembly of this State, entitled "An act to establish a mutual aid association, and to raise funds for the common school system of Alabama," approved the 10th day of October, 1868.—Pamph. Acts 1868, pp. 263, 264,

No. 43. Under authority of this act, the defendants had the right to set up and carry on a lottery, such as the defendants were engaged in. But it was contended, on the part of the State, that this act had been repealed before the finding of said indictment; that is, by an act entitled "An act to repeal an act entitled an act to establish a mutual aid association, and to raise funds for the common school system of Alabama," approved March 8, 1871.—Pamph. Acts 1870–71, p. 217, No. 197. On the other hand, it was contended by the defendants, that the State could not repeal said first mentioned act, so as to deprive them of the privileges under it, and for which they had paid into the treasury of the State the sum of two thousand dollars, for the year ending in November, 1871. The 4th section of said act first above named, is in these words: "SEC. 4. *Be it further enacted*, That before commencing business under the provisions of this act, the said parties shall deposit in the treasury of the State, to the credit of the school fund and for educational purposes, and annually thereafter, the sum of two thousand (2,000) dollars, for the term of twenty years, or so long as they may do business under the provisions of this act within said period, during which time the business aforesaid shall be exempt from taxation, except for State purposes."—Pamph. Acts 1868, p. 264, sec. 4. The proof showed, that this annual sum of two thousand dollars had been regularly paid into the treasury, as required by said act last above said, in the month of November in each year, since the approval of said act, and that the last payment was made in November, 1870. These facts are admitted in the argument here.

From this statement of the case, it is very evident that the defendants, when they were indicted, were acting under a license granted by legislative authority. The repeal of the act of December 10, 1868, could not impair this right. It was the fruit of a contract, a vested right, which the State could not take away. It was fenced about and protected by the highest principles of justice and by the supreme law. The State had sold the privilege to set up and carry on a lottery for a year at least, and had received the

price of the privilege in advance. This was clearly a contract, which the State is forbidden to impair. In such a case the State is the grantor, and it is estopped by its own act.—*Fletcher v. Peck*, 6 Cr. R. 137; *Dartmouth College v. Woodward*, 4 Wheat. 657; *New Jersey v. Wilson*, 7 Cr. R. 164; *Terrel v. Taylor*, 9 Cr. R. 43; *Von Hoffmun v. City of Quincy*, 4 Wall. 550; *Jefferson Br. Bk. v. Skelley*, 1 Black. 446. Besides, the same principle operates in this case that was allowed to control the decision in the case of *Brent v. The State*, (43 Ala. 297.) There this court very properly say: "We can see no good reason why a State, as well as an individual, is not held bound by this salutary and just maxim, that 'no man shall take advantage of his own wrong.'—Broom's Legal Maxims, top page 205. We think it clear that the appellant did not intend to violate any penal or other law of the State; in other words, that he acted in good faith, and verily believed he was doing what the State, by its statute, clearly authorized him to do."—43 Ala. 301, 302. This reasoning precisely meets the exigencies of this case, and it was a construction of the same statute in controversy here. The only difference between the two cases is, that the indictment in Brent's case occurred before the attempted repeal of the law, under which the defendants in both cases acted, and in this case the indictment was found after the attempted repeal. But the foregoing discussion shows that, in this case, this difference can not be permitted to alter the result.

The judgment of the court below is reversed, and the cause remanded, with instructions to the court below to discharge the defendants in that court, said Boyd & Jackson, from further prosecution on the indictment in this case.

RIVERS *vs.* THOMPSON.

[ACTION FOR RECOVERY OF LAND.]

1. *Adverse possession of wild lands ; what constitutes.*—The mere cutting of timber on wild lands is not such actual possession as the law requires to constitute adverse possession, if the lands be suitable for other purposes.
2. *Special charge ; when not error to refuse.*—It is not error for the court to refuse to give a special charge, the substance of which has been plainly given in other special charges, or in the main charge.

APPEAL from Circuit Court of Barbour.

Tried before Hon. J. McCaleb Wiley.

This was a suit instituted by appellee against appellant, on 24th September, 1858, for the recovery of certain lands in Barbour county, of which Shorter & Scott were the original government patentees. Shorter died in 1836, and Scott prior to 1853, in which year Scott's administrator obtained from the probate court of Russell an order to sell at Clayton, Barbour county, the undivided half interest of his intestate in said lands. The sale was made 25th of June, 1853, to one Robertson, who paid purchase-money same year. The confirmation of the sale was not had until 9th May, 1859, and deed to Robertson by Scott's administrator made on 2d June, 1859. On the 11th April, 1857, Robertson conveyed to the heirs of Shorter. The heirs of Shorter conveyed on 3d June, 1857, to appellee, the entire interest in the land in dispute. On 11th January, 1859, Robertson gave to heirs of Shorter a quit claim. In the summer of 1858 appellee deadened trees on part of the land, and was stopped from further possession of same by appellant.

Appellant set up in defense—1st, tax title ; 2d, adverse possession, and proved the assessment of said lands for taxes in 1853 to an unknown owner, advertisement of sale, and their sale on 3d April, 1854, to Wellburn, who received

a deed from probate court on 16th April, 1856. Wellburn conveyed one-half interest to appellant 11th December, 1856. In January, 1857, a tenant of appellant cut some trees on a part of said land, but soon after abandoned it. Appellant cut timber on said land in 1858, before the appellee undertook to clear it. After the suit appellant cultivated the land, which was productive for corn and cotton. It was admitted that in 1857, the said lands were wild, unimproved and uncultivated. There was proof tending to show proper legal notices given in each precinct by the tax assessor, before the said assessment in 1853.

Upon the foregoing evidence the court charged the jury as follows: "That upon the several deeds and patents, as read in evidence by the plaintiff, (there being no dispute as to their execution and fairness) he was entitled to recover all the lands described in the complaint, unless the right of recovery shown by them was defeated by evidence adduced by the defendant.

That defendant placed his defense on two grounds. First, the deed of the tax collector to Wellburn, and Wellburn's deed to him of an undivided one-half of the land. Second, that the defendant had adverse possession of the land at the time it was conveyed to the plaintiff by the deed of the Shorter heirs.

First, the jury should inquire whether the tax assessor of Barbour county, in 1853, posted bills or notices at three public places in each election precinct in this county at least fifteen days before he attended each precinct to assess taxes, (it being admitted that the assessor gave no such notice in any newspaper). That if the jury should find from the evidence that the tax assessor had not given the notice required by § 428 of the Old Code of Alabama, as read in their hearing, then they must stop their inquiries on the first ground of defense, and find for the plaintiff the lands described in the complaint; that if, however, they found that the tax assessor had given the notices required by § 428 of the Old Code, then they must go further with their inquiries, and see whether the tax collector had done what the law required of him in selling the land. That it

was necessary to the validity of the tax title that both the tax assessor and the tax collector should comply with all the requirements of the law in relation to assessments and sales to pay taxes, and that if either of them failed to comply with any of these requirements the tax sale would not be valid; that if, however, these requirements were complied with the tax sale and conveyance thereunder would be good, and the jury must find for the defendant.

On the second ground of defense the jury should inquire whether at the time the several deeds under which the plaintiff seeks recovery were executed, the defendant was holding said lands adversely.

That adverse possession was a question of fact for the jury to decide upon all the evidence. That to constitute adverse possession the defendant must take possession under color of title, and hold the same in good faith openly, notoriously and continually; that it was not necessary that the defendant be on the land all the time, he need not live on it, but he must have actual possession of some part of the land, and that possession must be open, visible, distinct and continuous, by such acts of ownership as the land was capable of.

That cutting of timber on land, fit for no other purpose, might be adverse possession, but if the land was suited to other purposes, then cutting of timber alone would not be sufficient to constitute adverse possession; that the deed of the tax collector was color of title enough, if the possession of the defendant was taken and held under it adversely.

That the defendant must have had adverse possession when the deed from Shorter's heirs was executed to plaintiff in June, 1857, and that the taking of possession in January, 1857, would not make the Shorter deed void, if that possession was abandoned before the deed to plaintiff was executed.

The appellant and appellee both asked several written charges, which were given, and appellant asked three written charges which were refused. It is unnecessary to set out the two first charges thus asked and refused, or even

their substance, as in the opinion of the court they were identical in principle and almost the same in words as the charges given at the request of the parties.

The third charge, thus asked by appellant and refused, is as follows :

“ The jury have nothing to do with the question whether any other tax collector’s deed, than the one read in evidence on the trial, ever conveyed a good title. If the jury believe from the evidence that every requisition of the statute law was complied with by the tax assessor and the tax collector in relation to the land here in controversy, and if the jury believe all the evidence in the cause, they must find a verdict for the defendant.”

To the charges given appellant excepted, as well as to the refusal of the court to give the charges asked for. There was a verdict and judgment for appellee.

GOLDTHWAITE, RICE & SEMPLE, for appellants.

J. L. PUGH, *contra*.

(No briefs came into the hands of the Reporter.)

B. F. SAFFOLD, J.—The charge in chief, to which the appellant excepted entirely, asserted the following propositions : 1st. The evidence of the plaintiff entitled him to recover, unless his right to do so was defeated by something adduced by the defendant. 2d. The defendant’s tax title would be good if all the requirements of the law had been complied with. There was no question about what these requirements were. 3d. Actual, notorious, visible and continuous possession under color of title was necessary to constitute adverse possession. A tax title was sufficient color of title if the possession was otherwise adverse. 4th. The deed from Shorter’s heirs would not be vitiated by a prior adverse possession, which was abandoned at the date of the deed. 5th. Cutting timber on land fit for no other purpose might be adverse possession, but if the land was suitable for other purposes such mere acts of occupation would not be sufficient.

We see no objection to this charge ; each proposition contained in it has been distinctly asserted by this court in other cases. It is not claimed that the plaintiff had actual notice of the defendant's occupation at the time of, or before the conveyance to him. — *Farley v. Smith*, 39 Ala. 38 ; *Brown v. Cockerell*, 33 Ala. 38 ; *Marston v. Rowe*, 43 Ala. 271 ; *Rivers v. Thompson*, 43 Ala. 533.

The first and second charges of the defendant, refused by the court, are correct in principle, but are contained in the charge in chief, even to the declaration that the possession of a part of the land under color of title to the whole was possession of the whole. The court may have refused them, on the ground that they had already been given.

The third charge of the defendant, refused, invaded the province of the jury.

The judgment is affirmed.

Application for re-hearing by appellant.

SAFFOLD, J.—We are asked to re-hear this case on two points. 1st. That the plaintiff did not have, at the commencement of his suit, the legal title to that portion of the land formerly owned by Scott. 2d. That the charges of the defendant refused by the court ought to have been given.

The sale of Scott's interest was made by his administrator, and the purchase-money was paid in 1853. Robertson, the purchaser, conveyed to the plaintiff, or those under whom he claims, in 1857. The sale to Robertson was confirmed and title ordered in 1859. The suit was commenced in 1858.

The doctrine of relation is applicable when necessary to promote the ends of justice, as to avoid the effect of an adverse possession, intermediate the conclusion of the contract and the giving of the deed, or to render an intermediate sale by the grantee valid.—*Jackson v. Bull*, 1 Johns. Ch. Cas. 81 ; *Jackson v. Raymond*, *ib.* 85 ; *Johnson v. Stagg*,

Falconer v. Robinson.

2 Johns. Rep. 500; *Jackson v. Dickenson*, 15 Johns. 309; 8 N. Car. (Iredell) 505. Where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred, and to this the other act shall have relation.—*Jackson v. McCall*, 3 Cow. 75.

We think the deed made to Robertson by the administrator of Scott should relate back at least to his payment of the purchase-money, in order to support his conveyance to Shorter's heirs.

The other point was considered in the first opinion.

A re-hearing is denied.

FALCONER vs. ROBINSON.

[BILL IN EQUITY FOR INJUNCTION.]

1. *Act to authorize governor to fill vacancies in certain county offices; not unconstitutional.*—The act of the general assembly of Alabama, entitled "An act to authorize the governor to fill vacancies in certain county offices," approved November 25, 1868, is not unconstitutional and void, but a valid constitutional act of the general assembly of this State, and authorizes the governor to fill all vacancies in the offices provided for by said act.
2. *Same; persons appointed under, hold for what term.*—Persons appointed by the governor, and duly commissioned by him, by virtue of said act, hold their office until the next general election to be held after such appointment.
3. *Same; not necessary to set out all laws repealed by.*—It was not necessary that the laws in conflict with said act, and repealed by the third section thereof, should be set out and contained in said act; said act is not a revisory or an amendatory act, within the purview and meaning of Art. 4, § 2, of the constitution of this State.

APPEAL from Chancery Court of Montgomery.

Heard before Hon. ADAM C. FELDER.

THE facts of this case are briefly these: On the 21st day of March, 1871, Patrick Robinson, the appellee, was ap-

pointed by the court of county commissioners tax collector of Montgomery county, and duly qualified as such, to fill the vacancy occasioned by the failure of the former tax collector, Falconer, to give an additional bond, &c. Shortly after this, Robinson made a demand upon Falconer for the books, papers, &c., of the office, but Falconer refused, and the probate judge, to whom Robinson had applied for an order, under the statute to compel the delivery of books, papers, &c., refused to grant the same, and sustained a demurrer to Robinson's complaint; and after this, both parties claimed to be, and acted as tax collector, and collected taxes, and gave notices, &c.

Robinson then filed his bill, alleging, in addition to the above facts, that Falconer is utterly insolvent, and has collected some taxes and the fees therefor, which by right should be collected by complainant, who, as he alleges, is the only legal tax collector; that by means of holding himself out as tax collector, &c., said Falconer has already interfered greatly with complainant in the discharge of his duties, and will do him irreparable injury if he is permitted to continue, &c., and collect the fees belonging to the office of tax collector. The bill prays that an injunction issue restraining Falconer from collecting taxes or fees, or in any manner exercising the rights or privileges of tax collector, and that upon the hearing said Falconer be compelled to produce and deliver the books and papers, &c. Upon bond being given, an injunction issued as prayed for.

Falconer's answer shows, that on the 17th of March, 1871, he was duly appointed by the governor of Alabama to fill the vacancy in the office of tax collector, and has since duly qualified, &c.; admits his insolvency, and denies Robinson's right in any manner to the fees of said office. Falconer also demurred to the bill for want of equity.

The chancellor overruled a motion to dissolve the injunction, &c., and hence this appeal.

FITZPATRICK, WILLIAMSON & GOLDTHWAITE, for appellant.

1. The first question arising in the cause is, can an injunc-

tion issue out of the chancery court, in such a case, restraining Falconer from exercising the duties of said office? The identical question came up before the chancellor of the State of New York in *Tappan v. Gray*, 9 Paige, 507. The injunction was prayed in that cause to restrain the defendant from exercising the duties and receiving the fees pertaining to the office of flour inspector, until the question involving the right to the office could be settled by legal proceedings which had been instituted for that purpose, and on the ground that the defendant was insolvent. The chancellor, although satisfied that the complainant was legally entitled to the office, decided that the "court of chancery had no jurisdiction or power to afford him any relief," and dissolved the injunction granted by the vice chancellor. The case was appealed to the court of errors, and affirmed by a unanimous court.—7 Hill, 259.

The same question came up again in the supreme court of New York, (24 Barlow, 265, *People v. Draper*,) in which the court, having both common law and chancery powers, an action of *quo warranto* was pending, and the injunction was prayed pending the law-suit and in aid thereof, and the court decided that in no case could the plaintiff be entitled to the aid of an injunction.

One insuperable objection to the exercise of this power by the chancery court is, that it would prevent the exercise of official duties in which the public have a high interest, merely to subserve the private interests of an individual. Is it not more important that the taxes should be collected for the benefit of the public, than that the complainant should be secured in fees to which he asserts a doubtful claim?—*People v. Draper*, 24 Bar. 265; *People v. Matlin*, 2 Ab. Pr. Rep. U. S. 289; *Hart v. Harvey*, 10 Ab. Pr. Rep. U. S.

2. But on the facts set out in the bill of complainant, is not Falconer the rightful, *de jure* tax collector of Montgomery county?

A solution of this question depends upon the validity of the act of the legislature of the 25th of November, 1868, (Acts, p. 351.) If this act is valid, there can be no two

opinions upon the right conferred thereby upon the governor to fill the vacancy in this office. This right has been exercised by the two governors in this State since the passage of said act, without question, and an inspection of the registry of officers appointed, in the secretary of State's office, (being commissioned by the governor, the court will take judicial notice of their appointments,) will show over one hundred and fifty appointments by the governor under said act. It is not unusual for the courts to advise with and consult the heads of departments as to their construction of acts regulating the practice of the departments.

But is not the act valid? The only objection to it is, that it purports to amend, alter or change an existing law, and is thus obnoxious to section 2 of Art. IV of the constitution of Alabama. The true tests as to whether a law comes within the constitutional prohibition are, does the new law purport to amend or alter or amend any law? Is the new law unintelligible with reference to an existing law? If the new act is complete in itself, does not purport to amend or alter an existing law, and is intelligible as embracing a rule of law without resorting to any other law to ascertain the meaning of the new law, then it is valid. That provision of the constitution does not prevent a repeal of an existing law, or portion of law, by implication. The constitutional provision of Maryland is more comprehensive than ours, and the above rule is adopted in that State.—*Ex parte Pollard*, (Walker, C. J.) 40 Ala. 100; *Crow v. Drewry*, 15 Grattan, 1; *Davis v. State*, 7 Md 151; *Pinkinson v. State*, 14 Md. 18-21; Sedg. on Stat. and Con. Law, p. 27.

3. This appeal is allowed by act of the legislature of 1870-71, and is to be determined at the *first term*.—Acts 1870-71, p. 20.

RICE & CHILTON, *contra*.—The controlling question in this case is, whether section 493 of the Revised Code continues of force, or has been entirely repealed? For it is manifest, that if that section remains of force at all, the

complainant's right to an injunction is clear, upon the facts stated in the bill and not denied in the answer.

That section is not an "election law," nor part of any "election law." It merely confers upon the commissioners court, in case of a vacancy in the office of tax collector, the power to *appoint* a person to fill such vacancy. It does not fix, or purport to fix, the term for which such appointee may hold the office. Its plain meaning is, that such appointee should hold only until a tax collector should be duly elected and qualified. Its object was to guard the public, the State and the county, against the obvious grievance of being without any tax collector at all. It is perfectly reconcilable with the act "to regulate elections in this State," approved October 8, 1868, (Pamph. Acts 1868, pp. 269-289); and, not being an "election law," is not repealed by section 99 of that act. The settled rule is, that "when two affirmative statutes exist, one is not to be construed to repeal the other by implication, unless they can be reconciled by no mode of interpretation." *Miles v. The State*, 40 Ala. 42.

Section 493 of the Revised Code can be obviously and easily reconciled with the act to regulate elections, until the actual occurrence of a certain event. Beyond doubt, the actual occurrence of that event supersedes the operation of the former in so far as that particular case is concerned; or to speak more accurately, the occurrence of that event stops all further operation of section 493 of the Code in that particular case, and brings that case within the exclusive operation of the act to regulate elections. The event referred to, is the election and qualification of a tax collector under the act to regulate elections. Until such election and qualification, "the contrariety or repugnance" between section 493 of the Revised Code and the act to regulate elections, does not begin or exist. This is demonstrated by the reasoning and authorities found in *Miles v. The State*, 40 Ala. 39.

An "election law" is one which relates to or regulates elections, and is plainly different and distinguishable from a law which merely confers upon a court of record power

to appoint a person to hold an office (a mere *locum tenens*) until an election as to that office is held.

The constitutionality of the act to regulate elections in this State is conceded, because it seems to be "a law in itself complete, and original in form," and can be readily understood, and can operate independently, without reference to any former statute or law; "the full effect" can be determined without reference to any former act.—*Tuskaloosa Bridge Co. v. Olmstead*, 41 Ala. 9; *Weaver v. Lapsley*, 43 Ala.

This view renders the unconstitutionality of the act "to authorize the governor to fill vacancies in certain county offices," approved November 25, 1868, more glaring than it would be if the act to regulate elections were excluded from consideration. This act of November 25, 1868, is unconstitutional for three distinct and fatal causes: 1st, it can not have operation or effect except as an *amendment* of one or more of the provisions of the Revised Code, and it fails to "set forth" any provision of that Code; 2d, it can not have operation or effect except as an amendment of one or more of the provisions of the act to regulate elections in this State, and it fails to "set forth" any provision of that act; 3d, its second section provides that the appointee of the governor to fill the vacancy "shall hold office until the day of the next general election thereafter," whereas no appointee to fill a vacancy in a county office created by statute can, under the act to regulate elections, hold the office beyond the time when there is a person elected to that office and qualified, at a *special* election therefor, held under sections 10 to 16, inclusive, of the act to regulate elections.

On motion to dissolve an injunction, in vacation, all amendable defects in the bill will be considered as amended.—*Ala. & Flor. R. R. Co. v. Kenney*, 39 Ala. 307.

PECK, C. J.—An act passed by the general assembly of this State, and approved November 25, 1868, will be found in the book of Acts of that year, page 351. This act is in

Falconer v. Robinson.

the words following, to-wit: "An act to authorize the governor to fill vacancies in certain county offices. Sec. 1. *Be it enacted by the General Assembly of Alabama*, That the governor be, and he is hereby authorized and empowered, to fill any and all vacancies now existing, or which may hereafter exist, in the offices of county commissioners, treasurers, tax collectors and assessors, justices of the peace, constables, sheriffs, and all other county officers, except such officers whose appointments are otherwise provided for by law, by the appointment of some person to fill said vacancy.

"Sec. 2. *Be it further enacted*, That the person so appointed shall be duly commissioned, and shall hold office until the day of the next general election thereafter.

"Sec. 3. *Be it further enacted*, That all laws and parts of laws in conflict with this act, be, and the same are hereby repealed.

"Sec. 4. *Be it further enacted*, That this act shall take effect from and after its passage.

"Approved, November 25, 1868."

It is conceded, that if this is a valid act of legislation, then the bill of complaint of appellee, plaintiff in the chancery court, is without equity, but it is contended by appellee that said act is unconstitutional, and therefore null and void.

In considering the question of the constitutionality of an act of the legislature, the presumption is in favor of the validity of the act, and it is not to be declared void upon a mere conflict of interpretation between the legislative and the judicial power. Before proceeding to annul, by judicial sentence, what has been enacted by the law-making power, it should clearly appear that the act can not be supported by any reasonable intendment or allowable presumption.—Cooley's Con. Lim. 105; *The People v. The Supervisors of Orange*, 17 N. Y. 241. The rule is, that in the exposition of a statute, it is the duty of the court to seek to ascertain and carry out the intention of the legislature in its enactment, and to give full effect to such intention, and they are bound so to construe the statute, if

practicable, as to give it force and validity, rather than to avoid it and render it nugatory.—*Clark v. Rochester*, 24 Barb. 471 ; Cooley, 186.

If, after a careful examination, there is a reasonable doubt in the mind of the court, it is its duty to hold the statute to be constitutional.—Cooley, 182, and notes 2 and 3. Keeping these rules of construction in mind, we proceed to examine the constitutional objections made to this act.

First. It is objected that the subject of said act is not *clearly expressed in its title*, and, therefore, does not comply with article 4, § 2, of the constitution. So much of this section as is applicable to this question is in the following words: "Each law shall contain but one subject, which shall be clearly expressed in its title." The subject of this law is, by whom vacancies in certain county offices shall be filled. The title clearly expresses this: They are to be filled by the governor. But, it is said, you can not tell by this title what particular county offices are to be filled by him. This is true, but the title is not the place for that to be expressed; that is a part of the matter and substance of the law, and the body of the law, and not the title, is the appropriate place to express it. To require it to be expressed in the title, would be to require the title to express, not only the subject, but also the matter and substance of the law. This objection, therefore, is not well taken.

Second. Another objection is, that this law is revisory and amendatory in its character, and does not contain the act or acts revised, or the section or sections amended, and so, does not comply with the latter part of said section 2, article 4, of the constitution. This latter part of said section 2 is as follows: "And no law shall be revised or amended, unless the new act contain the entire act revised, or the section or sections amended; and the section or sections so amended shall be repealed." There is nothing in this law to warrant this objection. It does not claim to revise any law, or to amend any section or sections of any law or laws whatever.

It is a law original, independent, perfect and complete in itself, and does not pretend to revise or amend any law, but repeals all laws and parts of laws in conflict with it. A law can not be said to be either revised or amended, when it is abrogated altogether. A law is revised or amended, not when it is repealed, but when it is, in whole or in part, permitted to remain, and something is added to or taken from it, or it is in some way changed or altered to make it more complete or perfect, or to fit it the better to accomplish the object or purpose for which it was made, or some other object or purpose.

This act not only does not revise or amend any other law or laws; it does not even refer to any by name, but only generally, and for the purpose of repealing them. It is, in every sense, an original act, conferring new powers upon the governor, authorizing him to fill any and all vacancies in the county offices expressly named in it, and "all other county offices, except such officers whose appointments are otherwise provided for by law, by the appointment of some person to fill said vacancy." Probate judges, solicitors, and the clerks of the several courts are county officers, whose appointment, in case of vacancy, is provided for in the constitution, and therefore not embraced in this act. But it is urged by appellee's counsel, that if this act is held to be valid, it will clearly have the effect to amend several sections of the Revised Code, and sections of acts passed since, not one of which is contained or set out in said act; and, as an example, reference is made to section 922 of the Revised Code. Let it be admitted, for the sake of the argument, that it does have the effect to amend that section, it will not better the appellee's case, nor affect the validity of this act. The amendment is an amendment by implication merely, and, therefore, is not embraced within the purview and meaning of said section 2, article 4, of the constitution. A law, or a section of a law so amended, need not be contained in the act, by which an amendment by implication is effected.—Cooley, 152, note 3. After a careful examination, we are unable to discover any constitutional objection to said act. It must, therefore, be held to

be valid, and, being valid, the appellee's bill of complaint is without equity, and consequently the appellant's demurrer for that cause should have been sustained by the chancellor, and the bill dismissed.

As no benefit will result to appellee by remanding the cause, and as the public service may, and probably will be prejudiced by delay, the decree of the chancellor is reversed, and this court proceeds to render here the decree that should have been rendered in the chancery court :

It is, therefore, hereby ordered, adjudged and decreed, that the injunction heretofore granted in this cause be dissolved. It is further ordered, adjudged and decreed, that the appellee pay the costs of this court, and of said chancery court.

[NOTE BY REPORTER.—At a subsequent day of the term appellee applied for a re-hearing, and filed in support thereof the following argument :]

The constitution of Alabama, article iv, § 2, provides that "each law shall contain but one subject, which shall be clearly expressed in its title ; and no law shall be revised or amended unless the new law contain the entire act revised, or the section or sections amended ; and the section or sections so amended, shall be repealed."

Applying the above constitutional tests to the act of 25th November, 1868, entitled, "an act to authorize the governor to fill vacancies in certain county offices," we insist that said act is unconstitutional and void for the following reasons :

1st. The act is an amendment of a former law on the same subject, which it fails to set out or contain.

What was the object of this constitutional provision as to amendatory statutes? Cooley on Const. Lim. p. 151, says : "The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effects, and the public, from the difficulty in mak-

ing the necessary examination and comparison, failed to become apprised of the changes made in the laws."

The supreme court of Alabama say, its object was, "to have the law amended, and the amending law presented in juxta-position to facilitate the comprehension and consult the convenience of all who examine the law after its enactment, as well as of the legislature which examines on its passage."—*Tuskaloosa Bridge Company v. Olmstead*, 41 Ala. 21.

If the act of 25th November, 1868, is an amendment of former law on the same subject, which it fails to contain, the fact that it is original in form and so fails to set out such former law or does not purport to amend such former law, would only make it more obnoxious to the constitutional provision.

But can any court say that because of this "originality of form" it is any less an amendment? That because it totally ignores former laws on the same subject it is any less obnoxious to the constitutional provision than the act mentioned, which simply referred to the section it purported to amend? Why should it be any less so? Can it give us a clearer idea than the first act, as to the existing law on the subject of which it treats? Does it, more than the other act, "consult the convenience or facilitate the comprehension of those who examine the law?"

So far from it, it imposes on the legislature, the courts and the people the necessity, and task of hunting out the laws in connection with which it shall operate and be construed, and that, too, without so much as intimating where they are to be found or that they are even in existence!

If the legislature may disregard and violate the constitution simply by putting the same law in one form instead of another, then the vitality of the constitution may be sapped; and the only difficulty connected with such an operation, is the question as to the form in which it may be done. The same thing done in one form, is a violation of the constitution; if done in another form, it is not a violation of the constitution. This is the substance of the

rule: that if a statute is original in form, complete and intelligible in itself, it may by implication revise and amend another law, without complying with the constitution; but if that statute is not original in form, complete and intelligible, then it must comply with the constitutional requirement, and set out the law amended and revised. With all respect, we insist that such a distinction has no foundation in reason; that the constitution knows no such distinction or rule; and that on account of any inconvenience arising from this provision of the constitution, no court can properly make any such distinction or rule. *Saddler v. Langham*, 34 Ala. 335; *Cooley's Con. Lim.* 177.

Does the act, then, of the 25th of November, 1868, amend any former law on the same subject?

Section 922 of the Code provides that "a county treasurer is appointed for three years, and until his successor is qualified, by the court of county commissioners in each county in the State, removable by such court whenever, in its opinion, the public good requires, and with power to declare and supply any vacancy."

Now, suppose the act of the 25th of November, 1868, had only applied to county treasurers, and had provided that section 922 of the Code be amended by striking out the words "and supply," in the last line of said section, and by adding to said section the words, "and the governor shall supply any such vacancy in said office." There can be no doubt that such an act would be an amendment. Does not the first section of the act of the 25th of November, 1868, if it is valid, as effectually make such an amendment as if it had declared so in terms? It does, in effect, strike out the very words we have suggested, and add the very provision. There is no difference in effect. The only difference is one of form, in that the supposed act would purport to amend, while the act as it stands would amend without purporting.

If the first section of the act of the 25th of November is unconstitutional, standing alone, the only remaining question is, how far the defect is or can be cured by the repealing clause, (3d section,) which purports to repeal all

laws and parts of laws in conflict with the act. Giving the widest scope to this clause, what would be its effect on section 922 of the Code? It would only strike out the provision giving the court of county commissioners the right to fill a vacancy in the office of treasurer. It would simply take away the appointing power, without conferring it on any one. If that power, therefore, is conferred by any part of the act, it must be by the first section. But the third section of the act can have no force or effect as a repealing clause. We admit that any given section of the Code may be repealed by mere reference to its number, but we insist that a clause designed only to strike out a word, or clause, or sentence in a given section, would not be a repealing, but an amending act.

But it may be asked, if we insist that the act of 25th November, 1868, should contain all the numerous sections of the Code relating to the filling of vacancies in all the offices named? We reply, that the framers of the constitution never designed that an act of this kind should be passed. If the legislature had complied with the constitutional provision that "no law shall contain but one subject"—if this act had applied to county treasurer only, it would not have been difficult to set out the law amended. Containing the number of subjects it does, we admit the difficulty is great.

In conclusion, the title of the act does not clearly express its subject. The title is, "an act to authorize the governor to fill vacancies in certain county offices." If it be said that its subject is the conferring new power on the governor, we ask, what power? Does it confer on him the power to fill a vacancy in the office of sheriff, or of tax collector? The powers conferred by the act, cannot be discovered from the title. We submit this point without further argument, as being too plain to dwell upon. For the causes shown, the act is clearly unconstitutional.

The constitution requires that the subject should be "clearly expressed." Is it so in the title of this act? The words of the constitution are words of command.

If it be conceded that our constitution does not destroy

Falconer v. Robinson.

the doctrine of repeal by implication, still it is certain that when, as here, there is a clause of express repeal, that of itself excludes any repeal by implication. The same statute cannot repeal expressly and impliedly. The law will not imply a promise, when there is an express promise. Nor will it imply a repeal when there is a provision of express repeal. The simple expression of one only of the implications, which the law would have made but for that expression, is sufficient to exclude every implication but the one expressed.—*Henly v. Falconer*, 32 Ala. R. 540; *Webb v. Plummer*, 2 Barn. & Ald. 746.

The opinion of the supreme court delivered in this case, evidently treats repeal by implication as of importance. But it is suggested for the consideration of the court, that whenever it is established that the legislature may, by means of repeal by implication, destroy the force of *part* of any former law, without setting forth that former law, then and from thenceforth that provision of the constitution herein above cited, is practically nullified.

The act of the legislature here in question, is in no just sense a repealing act. The power of repeal, is not the principal power exercised in its passage. In its very nature it makes provisions upon subjects covered by former laws, and does not destroy, or purport to destroy, by repeal or otherwise, the whole of these former laws. It merely substitutes in the new act provisions different, in part, from the provisions of the former laws. According to every English and law dictionary, this new act is, in its very nature, amendatory or revisory. It is not a repealing act; it expressly repeals only what conflicts with it; and thus makes it wholly uncertain what part of the former law it does aim to change. It brings in the very evils which the constitutional provision above quoted was designed to prohibit.

With the highest deference to the court, it is confidently asserted that the opinion in this case is incapable of being reconciled with the opinions and principles of *Olmstead v. Tuskaloosa Bridge Company*, 41 Ala. R., and *Lapsley v. Weaver*, 43 Ala. Rep.

The following response was made by—

PECK, C. J.—We have very carefully re-examined the opinion in this case and feel persuaded of its correctness.

The application for a re-hearing is denied.

MEADOWS ET AL. vs. EDWARDS & BRASSELL.

[BILL IN CHANCERY TO CORRECT ERRORS, &c., IN FINAL SETTLEMENT OF AN ADMINISTRATOR.]

1. *Decree pro confesso; when properly set aside.*—A decree *pro confesso* against a defendant, rendered by one whom the register appointed to represent him during his absence, is properly set aside by the chancellor.
2. *Section 2274, Revised Code; when authorizes a review by chancery court.* Section 2274, Revised Code, seems to authorize a review in the chancery court of the final settlement of a decedent's estate in the probate court, upon specified errors positively charged, little short of the privilege and right of appeal.
3. *Bill by minors to correct errors in final settlement; when not without equity.*—When, in such settlement, a decree has been rendered in favor of the administrator, a bill filed by minor distributees alleging that they were represented only by a guardian *ad litem*, and specifying errors equal in amount to the decree, is not without equity.
4. *Final settlement of administrator in chief, sufficient to support bill to correct errors.*—The final settlement of the administrator in chief, is sufficient to support the bill, although an administration *de bonis non* is pending. The distributees are parties in interest, unless the estate is declared insolvent, and may be so afterwards.

APPEAL from the Chancery Court of Montgomery.
Heard before Hon. N. W. COCKE.

The facts are stated in the opinion.

J. FALKNER, for Appellants.—1. The statute expressly

provides that where any error of law or fact has occurred in the settlement of any estate of a decedent, to the injury of any party without any fault or neglect on his part, such party may correct such error by bill in chancery within two years after the final settlement thereof, &c.—See Revised Code, § 2274; *Mock's Heirs v. Steele*, 34 Ala. 178; *Ansley's Adm'r v. King's Heirs*, 35 Ala. 278; *Marran v. Allison*, 39 Ala. 70.

2. The chancellor gives no reason for dismissing this bill except for want of equity. The bill charges that there were errors, both as to law and fact intervening, and that complainants, who were distributees, were all minors, and therefore not capable of guarding their own interests or protecting themselves, and that their brother, the administrator *de bonis non*, neglected to do so. I do not see what more is necessary to bring them within the provisions of the above statute, and the decree was on a final settlement of Edwards, administrator, and the bill shows that execution had been issued on the decree and levied on the property of the estate in the hands of the administrator *de bonis non*, and would have been sold but for the injunction.

3. In the opinion delivered at the present term of the court, in the case of *Powell, guardian, &c. v. Boon & Booth, adm'rs*, it is decided that Confederate treasury notes were issued in aid of the rebel government, were illegal, and that it was against public policy, &c. This being the law, it was error to allow the administrator for that kind of funds, and to render a decree in his favor for the amounts so advanced by him, and to allow him to have a decree for the amount of this worthless and illegal currency, and to collect the amount with interest out of these orphans, surely cannot be law.

4. The bill shows on its face that complainants were all minors at the time and had no one to protect their interests or rights, and if they have not this remedy they have none at all.

MARTIN & SAYRE, *contra*.—1. The remedy in chancery exists by virtue of sections 2274, 2275, of the Code.

Chancery, without the existence of those sections, would have no jurisdiction, and the settlements, as made, would stand, unless reversed by the supreme court.

2. Until a final settlement, the annual settlements are only *prima facie* correct, and may be re-examined.—§ 2159.

The administrator *de bonis non* is a mere continuance of the original administration, and until there is a final settlement the whole proceeding is *in esse*, and may be examined into by the probate court. The Code uses both words, *settlement* and *final settlement*; and makes the jurisdiction of the court to depend in part on that fact.

3. There can not be but one final settlement of an estate. Until there is a final settlement, it cannot be ascertained who are the parties interested, or who injured. The estate may be declared insolvent; it may, beyond all peradventure, be exhausted in the payment of debts; so that a legal heir will and can by no possibility, in any event, get anything. In such cases, the legal heirs cannot be said to have suffered any injury.

The person filing the bill must be a party to the settlement—a party entitled to something under the settlement.

4. Until a final settlement, the administrator is the only party entitled to any portion of the estate, except the creditors, and no decree can be made by any court for a distribution until after a settlement as to them is made.

5. There can be no party legally injured, until after there is a decree. These parties, filing this bill, may never have any interest; or if they had, two or three bills might be filed in regard to the administration of the same estate.

6. The bill ought to show upon its face, certainly, that errors in fact or in law have taken place.

It is not shown that the matters stated in the bill are facts.

And it is not shown that any error was committed by the court.—*Dantworth v. Dantworth, adm'r*, 35 Ala. 74.

7. The record of the court of probate ought to show, affirmatively, that errors in fact or in law were committed by the court in its action upon the accounts filed for a settlement.

And those errors ought to be so alleged in the bill, that the chancery court could make its decree upon the allegations as made.

And the relief must be confined to the allegations as made.

The bill cannot be entertained for general relief.

8. The bill does not show, fully, these objections were not made in the probate court. The bill does not show that they did not have full notice of the settlement made; neither does it show that these parties were not represented in said settlement. Neither is any reason assigned why they did not insist in the probate court on these objections. *Moore v. Lesseur and Wife*, 33 Ala. 243; *Stein v. Burden*, 30 Ala. 273; *Gillam v. Bloodgood et al.*, 15 Ala. 41.

The reasons why the objections were not made in the probate court must be alleged, so that the court may be informed whether such causes are good or not.

The facts stated must show that there was no negligence. *Wilson v. Randall and Wife*, 37 Ala. 76; *Mock's Heirs v. Steele*, 34 Ala. 200.

B. F. SAFFOLD, J.—The decree *pro confesso* against Edwards was set aside because it was not rendered by the register, but by another acting for him in his absence. There was no error in this.

The bill was filed by the appellants to correct errors alleged to have occurred in the final settlement of the accounts of the appellee, Edwards, as administrator of the estate of George W. Brassell. It was dismissed for want of equity.

The errors charged are, 1st. The administrator failed to account for the value of some firewood which he cut and hauled in 1864, with the slaves and wagon and teams of his intestate's estate, and sold for about \$600. 2d. He paid out \$611.45 in Confederate currency, for which he was allowed credit at its nominal value, though it resulted in bringing the estate in debt to him to that amount in lawful money.

The averments in denial of fault or negligence are, that

the complainants were minors without any guardian, having been represented by a guardian *ad litem* only; and that their brother, John E. Brassell, who was the administrator *de bonis non*, failed or neglected to guard their interests.

The difficulty in this case is that similar allegations of error, on belief merely, and of inefficient representation, may be made in every case where minors are represented by guardians *ad litem*. On the other hand, grave injury may be done them, if they are to be concluded by the action of an indifferent guardian *ad litem*, who does not care to make himself acquainted with the true situation of their affairs.

Section 2274, Revised Code, which authorizes this proceeding, requires but two conditions, error of law or fact, and the absence of fault or neglect of the party injured. Section 2275 allows to infants two years after the termination of their disability. The statute seems to contemplate a review of the settlement made in the probate court, upon specified errors positively charged, little short of the privilege and right of appeal.

If the error be admitted, can a minor in any case be said to be at fault, in view of his probable tender years, and because he is not allowed to represent himself.

The second error above stated is too vaguely alleged in the bill. The facts stated may be true, and yet consistent with a just decree allowing the credit. If the administrator settled debts, for which lawful money might have been demanded, with Confederate currency obtained by the sale of property at a time when it was the only circulating medium; or if, having excusably obtained it, he used it in the payment of debts contracted to be paid in such currency, he ought to have been allowed the credit. There are other instances which would justify the allowance. It was not charged that the balance decreed in his favor was on account of Confederate currency estimated at its nominal value in lawful money.

The want of equity in the first allegation is not so manifest. An answer of the defendant Edwards, which was correctly adjudged by the court to be insufficient, discloses

that he did not report to the probate court his liability for the use of some of the property of the estate in the matter of the wood, though he avers that the receipts were inconsiderable, and were applied to the use of the complainants. In *Morrow v. Allison*, 39 Ala. 70, errors not considerably greater than the one alleged in this case were deemed sufficient to sustain the bill. The administrator is about to take the property of the complainants in payment of a decree for no greater amount than the error complained of. We think on this point the court erred.

The objection made by the appellee that the estate is not yet finally settled, is not well taken. So far as he is concerned, it is settled, and he is about to enforce his decree. The administrator *de bonis non* cannot be charged with errors of the court, or with those of his predecessor, in the absence of proof of such culpable neglect of his duty, or collusion, as would render any administrator liable for waste or failure to collect assets. The distributees of an estate are interested parties until it is declared insolvent, and may be to some extent afterwards.

The decree is reversed and the cause remanded.

HALL & CURRY vs. BRAZELTON.

[ATTACHMENT—PLEADING.]

1. *Attachment; for what cause may be abated.*—An attachment sued out on an affidavit defective in matter of substance, may be abated on the plea of the defendant.
2. *Attachment; omission of what in affidavit, is matter of substance.*—An affidavit that omits to state that the attachment is not sued out for the purpose of vexing or harassing the defendant, is defective in substance, and is not amendable.
3. *Pleading; what sufficient under the system provided by the Revised Code.* The common law strictness required in pleas in abatement, is abolished with us, and pleas in bar and abatement, stand on the same

Hall & Curry v. Brazelton.

footing, and all that is necessary in either is to state, succinctly, the facts relied on, in such manner as to present a material issue.

4. *Pleas; what defects of, not good ground of demurrer to.*—Defects in stating the commencement or conclusion, or in the prayer, of a plea in abatement, are not defects of substance, and, therefore, no good cause of demurrer—nor is duplicity, in such a plea, a good ground of demurrer.

APPEAL from Circuit Court of Perry.

Tried before Hon. M. J. SAFFOLD.

On the first day of December, 1865, the appellants sued out an original attachment against the appellee, returnable to the May term, 1866, of the circuit court of Perry county.

At that term of said court the appellee pleaded in abatement of said attachment, that the affidavit did not state that the attachment "was not sued out for the purpose of vexing or harassing said defendant." The plea prayed judgment of said attachment, affidavit and complaint, and that they might be quashed.

The cause was continued from time to time until the fall term of said court, 1869, when, as the bill of exceptions states, the plaintiffs filed a demurrer to said plea, and assigned the following causes of demurrer, to-wit:

1. Said plea does not commence and conclude with the proper prayer.

2. The plea is double, as it sets up different matters of abatement.

3. The plea does not conclude with a prayer of judgment of the attachment, and that the same may be quashed.

4. The plea prays judgment of the affidavit, attachment and complaint for a supposed defect, confined to the affidavit, and not existing in the attachment and complaint.

5. The plea prays judgment of the affidavit, attachment and complaint, without setting out the complaint or showing any defect in the complaint.

6. The plea is not signed by the defendant or his attorney.

The demurrer was overruled, and the plaintiffs asked leave to amend the affidavit, &c., which being denied, they declined to plead further, and "it appearing to the satisfac-

tion of the court that the matters of abatement set forth in the plea are true," judgment was rendered, quashing and abating the attachment and declaration, and taxing the plaintiff with costs, and hence this appeal.

The errors assigned are—

1st. Overruling the demurrer to the plea in abatement.

2d. Refusing leave to amend.

ALEX. WHITE, and JOHN T. HEFLIN, for appellant.

_____, *contra*.

PECK, C. J.—The affidavit is clearly defective. The omission to state that the attachment was not sued out for the purpose of vexing or harassing the defendant, is an omission of matter of substance, and not of form merely, and therefore cannot be cured by amendment. Defects of form, only, in such an affidavit, are amendable.—Revised Code, § 2990; *Hall & Curry v. Brazelton*, 40 Ala. 406.

Under our present system of pleading, no objection can be made to the form of a plea, whether it be in bar or abatement of the action. Section 2638, Revised Code, says a plea must consist of a succinct statement of the facts relied on in bar or abatement of the suit, and no objection can be taken thereto, if the facts are so stated that a material issue can be taken thereon.

It is very clear, this plea contains facts so stated, that a material issue can be taken on them. This is all the statute requires. The manner of their statement is no good cause of demurrer. Section 2629 of said Code, says no objection can be taken for defect of form in a plea; and section 2656 declares that no demurrer in pleading can be allowed, but to matter of substance.

By the common law, great strictness was required in pleas in abatement, and defects of form were treated as matters of substance, and might be taken advantage of by a general demurrer. This strictness is not now necessary. Pleas in bar and in abatement, with us, stand upon the same footing, and all that is required in either, is to state

the facts succinctly, so as to present a material issue in law or fact.

Section 2989 of said Code enacts, that attachments issued without affidavit and bond, as therein provided, may be abated on plea of the defendant, filed within the first three days of the return term. The manifest meaning of this section is, that an attachment may be abated if issued without a sufficient affidavit or bond; it does not require it to be issued without either, to justify a plea in abatement.

An affidavit or bond, defective in matter of substance, is in legal contemplation equivalent to no affidavit or bond whatever.

If the defect be of form, only, it may be amended, whether it be in the affidavit or bond, or both; but an attachment must not be dismissed for any defect in, or want of, a bond, if the plaintiff, his agent or attorney, is willing to give or substitute a sufficient bond. The affidavit, however, if defective in substance, is not amendable, and the attachment must be abated, on the plea of the defendant.—§ 2990, Revised Code.

The causes of demurrer, assigned to the plea in abatement in this case, do, none of them, disclose any defect of substance. They all relate to the form and manner of the plea, and not to any matter of substance, and for that reason constitute no good cause of demurrer to said plea; therefore, the court below committed no error in overruling said demurrer.

The 6th cause of demurrer is not sustained by the record; the plea is not only signed, but sworn to, by the defendant.

The judgment is affirmed, at appellant's cost.

IRVINE, ADM'R, vs. ARMISTEAD.

[BILL IN EQUITY BY WIDOW, PRAYING TO HAVE DOWER ASSIGNED IN LANDS OF WHICH THE HUSBAND WAS SEIZED IN FEE DURING COVERTURE, BUT WHICH WERE SOLD UNDER EXECUTION ON JUDGMENT OBTAINED PRIOR TO THE MARRIAGE.]

1. *Judgment; what not such a lien as defeats widow's right of dower.*—A judgment of a circuit court, rendered on the 16th day of September, 1861, on which an execution was issued within the year after its rendition and returned unsatisfied, and upon which judgment no other execution was issued until September, 1865, is not a lien on the lands of a defendant in said judgment, which will defeat his widow's right of dower in his dowerable lands, when the marriage with such defendant took place on the 29th day of November, 1862, and after the rendition of such judgment.
2. *Same; what no bar to right of dower.*—A sale of such defendant's dowerable lands under execution on such judgment, and the conveyance of the same to the execution purchaser by the sheriff in 1866, is no bar to the widow's dower.
3. *Same; purchaser at execution sale under such judgment; for what is liable.*—The purchaser under such sale, or his administrator, is liable, if he resists the widow's application for dower in such lands, to account to her for the mean profits of such dower lands from the death of the husband, by way of damages, during the tenancy of the same.
4. *Chancery, courts of; of what have original jurisdiction.*—The chancery courts of this State have original jurisdiction to entertain suits for dower concurrent with the courts of law, especially where there is a purchaser under execution title in possession of the lands at the death of the husband, and there is necessity for an account for mean profits, by way of damages, between the tenant of the lands and the claimant of the dower interest.

APPEAL from Chancery Court of Lauderdale.

Heard before Hon. WILLIAM SKINNER.

THE case made by the bill and answers may be briefly stated as follows :

On the 16th day of September, 1861, Brickell obtained a judgment in the circuit court of Lauderdale, against George G. Armistead and others for \$1164 and costs. Execution was issued on this judgment on the 27th day of

Irvine, Adm'r, v. Armistead.

September, 1861, and returned unsatisfied. On the 29th day of November, 1862, George G. Armistead intermarried with the complainant in the court below. In 1865, an *alias* execution, and the only one issued after the 27th day of September, 1861, was placed in the hands of the sheriff, who levied it upon the lands of said Armistead and sold the same early in October, 1866, to James B. Irvine. Irvine paid the purchase-money, received the sheriffs deed, and on the 6th of October, 1866, entered into the possession of the land. On the 11th day of October, 1866, said George G. Armistead departed this life in Lauderdale county, leaving him surviving a widow (the appellee) and several children. Irvine, the purchaser, died soon after the sale, and his administrator continued in possession of the land after his death. George G. Armistead was seized in fee of the land sold by the sheriff, at the date of the rendition of the judgment as well as the time of his marriage and at the date of the sale of the land.

On the 2d of February, 1869, appellee, the widow, filed her bill in the chancery court of Lauderdale, praying that dower be allotted her in the lands of her husband, bought by Irvine, and then in the possession of his administrator, and that an account be stated, &c.; that the administrator be decreed to pay her one-third of the mean profits of said lands from the date of her husband's death. The administrator and proper parties were made defendants to the bill, and they answered and demurred to the bill for want of equity.

On the hearing the chancellor overruled the demurrer, granted the relief prayed, &c., and referred it to the register to take and state an account of the rents and profits of the lands, from the date of the death of complainant's husband, &c., allowing the administrator credits for improvements, &c. The register reported that complainant was entitled to the sum of \$604.93, as her third of the mean profits, and this report, no objections having been filed, was duly confirmed by the chancellor.

The defendants appeal and assign as error—

1st. Overruling demurrer for want of equity.

2d. The final decree rendered.

3d. Allowing rents to complainant.

PICKETT & PATTERSON, for appellant.—Appellee is not entitled to dower in the lands.

1st. Because the lien on said lands, created by the rendition of said judgment on the 16th September, 1861, was paramount and superior to the claim of dower, which did not attach until the marriage in November, 1862.

2d. Because the general doctrine on the subject is, that the wife's dower is liable to be defeated by every subsisting claim or incumbrance in law or equity which existed before the inception of her right to dower, and which would have defeated the husband's seizin.

To sustain this position the following authorities are relied on:—Peck on Dower, 106; 4 Kent's Com. 50; Roper on Husband and Wife, 358; 1 Scribner on Dower, 564, 572, 574, and cases cited.

Dower is defeated by a mortgage, or judgment lien, subsisting before dower attaches, and which would destroy the husband's seizin; and a judicial sale for the payment of debts will defeat the right of dower, when the lien created by the judgment existed before the marriage.—2 Bouvier, 247; 12 S. and R. 21; 1 Yates, 300; 1 Wash. on Real Estate, 193, 240, top page, 3 p. 117; 2 Carter, 58; 10 Maryland, 5; 8 Blackf. 274; 31 Maine, 403, 11 § and m. 164; 2 Robeson, (Va.) 398; 1 Scribner on Dower, 572; 7 Humph. 72; 1 Ohio, 99; Hilliard on Mort. 631; 3 Bacon's Ab. 236; 14 Ala. 370; 23 Ala. 268; 36 Ala. 533; 40 Ala. 540; 21 Ala. 528; 35 Ala. 497.

Another view of the case is this: that the judgment under which the land was sold is a contract between the parties, and composes the highest obligation known to the law, and entitled to the protection of the constitution. How, then, could Armistead, by any act of his own, impair or destroy its force, or take away, reduce or impair, any of the securities given by law for its satisfaction.—Chitty on Cont. 2, 23; 1 Par. on Cont. 7; *Weaver v. Lapsley*, 43 Ala. By the act of the legislature, December 10th, 1861, a lien

was created in favor of judgment creditors on all the property of the defendants in the State, and all subsequent acts carefully preserved this lien.—Acts, 8th December, 1863; Acts, 23d February, 1866, p. 81; Acts, 19th February, 1869, p. 609; Acts, 1868, p. 266; Rev. Code of Ala. §§ 287, 2891.

But appellee contends all the acts of the legislature are void, because enacted by a legislature of a State at that time at war with the United States, and that during the war of rebellion the State government was an illegal one, and its laws and courts mere nullities, and can not be made valid by the subsequent legislation of the present rightful State government, after restoration. This proposition ought not to be sustained, because it would unsettle the entire social fabric, and open upon the country a pandora's box to flood it with unmitigated evils, and, besides, is contrary to the decisions of the supreme court of the United States, and the several State courts where the question has come before them.—*Texas v. White*.

An ordinance was passed by the convention of 1861, relieving the officers in Alabama from the necessity of taking an oath to support the government of the Confederate States, or the insurrectionary government of Alabama, and it is a matter of judicial history, that none of the incumbents in office were required to vacate by the constitution of 1861. It will be seen by reference to the exhibits on file in this cause, and copied in this cause, and copied in the record, that the Hon. John E. Moore, as judge, Shaler Ives, as sheriff, and V. M. Benham, as clerk, held the term of the Lauderdale county circuit court, at which this judgment was rendered. This court will take judicial notice, that on the 11th day of January, 1861, the Hon. John E. Moore was the judge of the 4th judicial circuit of Alabama; that Shaler Ives was the sheriff of Lauderdale county; that V. M. Benham was the clerk of said court, and that said judgment was rendered at a time prescribed by law, in force prior to the passage of the ordinance of secession, for holding of fall term of said circuit court. This court will take judicial notice of the fact, that each

of the officers of said court held their respective offices by virtue of commissions derived from the rightful and legitimate government of Alabama, and that the term of neither of said officers had, on the 16th day of September, 1861, expired by operation of law. There is not the slightest evidence in the record, that either of said officers, prior to the rendition of said judgment, had ever engaged or in any manner participated in the rebellion. Suppose the judgment in question had been rendered under the same circumstances, on the 16th day of September, 1860, instead of 16th of September, 1861, it would, beyond all controversy, have been a valid judgment in every particular. This being the case, how can this judgment become a nullity, or even a foreign judgment by virtue of the ordinance of secession? How could a void ordinance give validity to what would otherwise have been a valid judgment? In the case of *Chisholm v. Coleman*, 43 Ala., this court recognized, it is submitted, the principle here contended for. Coleman was judge by virtue of an election held in 1858. On the 16th day of May, 1862, he became a colonel in the Confederate army. He had drawn his salary up to, and including the 31st of March, 1862. This court decided that he was entitled to his salary as judge, from the 31st day of March, 1862, to the 16th day of May, 1862, the day that he embarked in rebellion against the government of the United States. Now, suppose that judge Coleman had rendered a judgment, otherwise regular and proper, at a time intervening between the 31st day of March, 1862, and the 16th day of May, 1862. Would such judgment have been valid? Would it have been a domestic judgment or a foreign one, or in the nature of a foreign judgment? To hold such a judgment void, would be an anomaly in the history of judicial decisions. We would then have the unparalleled precedent of the supreme court of a loyal State holding a judgment void, as between citizens, for no other reason than that it was contaminated by the rebellion, and yet ruling that the judge who rendered the judgment was justly and fairly entitled to be paid out of the treasury of the State for his services. To hold

that such a judgment was foreign, or in the nature of a foreign judgment, would be equally obnoxious to law and sound reasoning. If the judgment was foreign the judge who rendered it was foreign, and we would then have the precedent established that foreign judges were entitled, upon proper application, to payment of their salaries out of the treasury of Alabama. Such a doctrine is utterly untenable, and directly at variance with the ruling of this court in the case just cited. That decision, it is contended, is grounded in correct reasoning, and happily it has met with the concurrence of the supreme court of the United States in the case of *White v. Cannon*. In that case, the court says "that a judgment rendered by the supreme court of Louisiana after the passage of the ordinance of secession in that State, was not affected thereby, for the same reason that the ordinance was void."—See *White v. Cannon*, 7th Wallace, p. 442; Ordinance Convention, 21st Sept. 1865; Ordinance Convention, 6th Dec. 1867; *Randolph v. Baldwin*, 41 Ala. 309; *Winter v. Dickerson*, 42 Ala. 92; *Hoffman v. Boon & Booth*, 43 Ala. 1869; Ordinance No. 15, Convention 1867; *Auditor v. Taylor*, 43 Ala. 1869; *Hall v. Hall*, June term, 1869; *Armistead v. State*, 43 Ala.

Under our statutes the widow's quarantine does not extend beyond the right to occupy the dwelling house in which her husband dwelt next before his death, and the lands thereunto adjoining.

In this case, the record shows that the lands in which dower is claimed, are situated some ten miles from the mansion and lands adjoining, where the husband dwelt next before his death. And until dower is assigned, the widow has no estate whatever in said lands, but the mere right to have dower allotted to her, and not being entitled to the possession of such lands has no claims for back rents. 6 Ala. 873; 13 Ala. 329; 35 Ala. 497, 644 and 528; 36 Ala. 203; 37 Ala. 484; 38 Ala. 608; *Clay v. Richardson*, 43 Ala.

O'NEAL, LEWIS & COOPER, *contra*.

(Appellee's brief did not come into Reporter's hands.)

PETERS, J.—It is insisted by the appellant that the judgment of the circuit court in favor of Brickell against said George G. Armistead operated as a lien on the lands mentioned in the complainant's bill ; and that this lien, having accrued before the marriage, defeated the right to dower upon the sale under said execution issued on said judgment to satisfy the same. This defense sets up two assumptions : First, that said judgment was a lien on said lands ; second, that the right of dower attached, subject to be defeated by this lien on a sale of said lands to satisfy said judgment. At least, I so understand the argument of the learned counsel for the appellant, Irvine. The first assumption is the first to be considered. If that proves untenable, then the second must fail also ; because the second stands upon the first.

Dower is greatly favored by the law. It is classed with those rights we are accustomed to denominate as sacred. It is ranked with the right to life and to liberty.—4 Bacon, 345 ; 1 Story's Eq. § 629. This may well be so in a free country ; because it is for the comfort, the support and the protection of the mothers and the children of the State. In truth, the law upon the subject of dower is a pledge by the commonwealth to them that, upon the father's death, they shall not be expelled from the home which he had provided for them.

When the judgment here relied on was rendered, there was no law of this State, which this court can enforce, that made such a judgment a lien on the lands of the defendants therein. The execution in the hands of the sheriff was made by law a lien on the lands and other property of the defendants subject to levy and sale, but this lien did not belong to the judgment. And this lien was only continued as long as the writ of execution was regularly issued and delivered to the sheriff without the lapse of an entire term.—Code of Ala. § 2456 ; Rev. Code, § 2872 ; *Daily v. Burke*, 28 Ala. 328 ; *Curry v. Landers*, 35 Ala. 280. The enactment of the insurgent government in this State, of

December 10, 1861, was of no force, so far as this case is concerned. It did not change the law as it existed before its date.—*Texas v. White*, 7 Wall. 700; *Martin v. Hewitt*, June term, 1870; *Ray v. Thompson*, 43 Ala. 434; *S. C. on second application for re-hearing*, June term, 1870. This act out of the way, there was no subsisting lien on the lands in controversy at the date of said marriage. The execution had not been regularly issued and continued from term to term. This was necessary to keep the lien in force.—Code, § 2456; *King v. Kenon*, 38 Ala. 63; see, also, *Kirksey v. Hardaway*, 41 Ala. 338; *Sanford v. Ogden, Furguson & Co.*, 34 Ala. 118; *Troy v. Smith & Shields*, 33 Ala. 469. The enactments of December 8, 1863, February 20, 1866, and February 19, 1867, have all been passed since the marriage of Mrs. Armistead with her said husband, now deceased, and they can not be allowed to affect her rights, unless it can be clearly shown that it was the legislative purpose to have done so. Her right to dower had then attached to *all the lands* of her husband which fell within the description of those mentioned in the statute. These acts were not intended to displace or impair this right; and on the death of the husband it became complete.—4 Kent, 50; Rev. Code, § 1624. Then, without intending to repeat the discussion on the validity of the judgment now interposed as a bar to the right of dower in this case, as a judgment of a court of the insurgent government in this State, during the supremacy of the late rebellion, it may be allowed that, if it were valid, it possessed no lien at the date of the marriage in this case.—33 Ala. 469, *supra*. The husband's seizin, then, at the marriage, was in fee and unembarrassed by any lien. When this is the case the right of dower accrues, and it continues until it is *relinquished* by the wife, in the manner prescribed by the Code. And as this is the only mode of barring the wife prescribed by the statute, it may be very seriously doubted whether any other was intended to be allowed, if the marital relation continued up to the death of the husband.—Revised Code, §§ 1624, 1626 and 1629.

But did the legislature intend, in granting the right of

dower to the widow in the husband's lands, to make it, under any circumstances, subservient to the lien of a judgment at law against the husband, whether before or after marriage? Certainly, from what has been said in the foregoing discussion, the right to dower is superior to all liens in which the wife does not join, which accrue after marriage. *Owen v. Slatter et al.*, 26 Ala. 547; *Nance v. Hooper*, 11 Ala. 552. Neither the lien of a judgment nor the right to dower depend upon contract or grow out of contract, as that word is used in a commercial sense. They are the creatures of the statute, and may both subsist at the same time. When this is the case, was it the purpose of the legislature that the right of dower should be displaced by the lien of the judgment? As the will of the legislature is the basis of both rights, it could, within the strict limit of its powers, declare that the right of dower should *always* displace the lien of the judgment. This is the reasoning of this court in the analogous case of exemptions in favor of the family.—*Watson et al. v. Simpson*, 5 Ala. 233. The Code defines dower in this language: "Dower is an estate for life of the widow in a certain portion of the following real estate of her husband, to which *she has not relinquished her right* during the marriage: 1. *Of all lands* of which the husband was seized in fee during the marriage. 2. Of all lands of which another was seized for his use. 3. Of all lands to which at the time of his death he had a perfect equity, having paid all the purchase-money therefor."—Rev. Code, § 1624. This is the pledge of the commonwealth to the woman who marries. It is a statutory privilege. It is expressed in language perfectly plain, absolute and unlimited. Were it a stipulation in a deed, there could be no rational contest about its meaning and intent. If there is a marriage, seizin during the coverture, and death of the husband, then the right to dower is absolute, unless the widow has relinquished it. This is the sole condition that may defeat it.

The same law, it is true, makes the husband's lands subject, by judgment and execution, to the payment of his debts. But it does not say that this privilege shall override

and displace the superior privilege of dower on behalf of the widow. To say that the lien is to be preferred because it is prior in time, is to qualify and limit the stipulation giving dower. This can not well be done, where it is legitimate to make the construction most favorable to the right of dower. As soon as the facts exist that give birth to the right of dower, then the enjoyment of the fruits of the lien is postponed till possession under the dower is exhausted. The execution purchaser, by the sale, steps into the shoes of the debtor, it is true; but he takes the estate subject to the dower, as the husband held it from the moment of the marriage. When the dower right is exhausted, the execution purchaser takes all. These are questions not to be settled by the common law. They spring out of our statutes, and are to be solved according to their language and intent. And it seems to me most conformable to the spirit of our law to apply to the construction of the statute defining and regulating dower, the same liberality that has been granted to the like statute of exemptions. 5 Ala. 233, *supra*. In doing so, it simply places the right to dower, which attaches after the judgment against the husband, on the same footing that it holds when it attaches before the judgment, (11 Ala. 552, *supra*,) and upon the footing of exemptions in favor of the family.—5 Ala. 233, *supra*. But it is not really necessary to settle this question in this case. It is determined without it.

The judgment in favor of Brickell against George G. Armistead, upon which the appellant relies to defeat the complainant's claim of dower in this case, can not now receive in this court such force as would give it that effect. It was wholly devoid of any right of lien. It could not, then, stand in the way of the right of dower claimed by Mrs. Armistead. It will hardly now be seriously pretended that there was no change wrought in the government of this State by the passage of the ordinance of secession, and that the government was the same after the *eleventh* day of January, 1861, that it was before that day. Nor will it be contended that the government existing up to the passage of this ordinance was overthrown, and a "new

government was erected in its stead" by piece-meal. 6 Wall. 13. If this did not so take place, then the judicial department of the legal government of the State passed away with the executive and legislative departments of the same. What was found here afterwards exercising jurisdiction in any of these departments of government, belonged to the new organization under the insurgent power. This insurrectionary organization was established in hostility to the constitution of the United States, and for this reason the whole structure was illegal and void.—*Texas v. White*, 7 Wall. 700, 732, 733. Let it be admitted that the merits of the case of *Texas v. White*, above cited, turned upon a *judgment* of a rebel court in that State, instead of a *law* of the unlawful government, would the judgment have escaped the fate of the law? It seems to me that it could not, if the reason given for the invalidity of the law was correct. And in this the whole court concurred. Then, if the law was void, as it was pronounced, the judgment must have been void also. A void judgment is nothing. It is not a mere irregularity, which the legislature might amend. To make such a judgment good, would be to make a new judgment. This the legislative authority can not do, nor any other authority in the State acting under constitutional limitations. The legislative power may make such proceedings the basis for a new trial, or a ground for review and correction of error, or it may refuse the parties relief who have acted under them.—Ord. No. 39, 40; Pamph. Acts 1868, pp. 186, 187, 269. It seems to me, that to go beyond this, under our system, would be an unjustifiable usurpation. That the learned and able counsel for the appellant have wholly failed to furnish any domestic authority supporting the validity of the judgment, without ratification or cure of some kind by the legal government, is the amplest and most satisfactory evidence that none such exists. That such judgments should be cured in some way, is the opinion and practice of jurists of the highest standing.—Ord. No. 26, Rev. Code, pp. 58, 59; 3 Ala.

The facts, then, show that the complainant in the court

Irvine, Adm'r, v. Armistead.

below was entitled to dower in the lands set forth and described in her bill. In such case, the court of chancery has original and concurrent jurisdiction with courts of law to ascertain and adjust her rights.—4 Kent, 71, and cases there cited; 1 Story Eq. § 624, *et seq.*; Rev. Code, § 1631; *Brooks v. Woods*, 40 Ala. 538; *Waters v. Williams*, 38 Ala. 680; *Owen v. Slatter*, 26 Ala. 547.

The widow's title to the dower lands is a legal title, and it springs up into perfection immediately on the death of her husband. If it can be defined by metes and bounds, it is as perfect as though it were created by deed dated on the day of the husband's death. And if the allotment by metes and bounds can be made, she is entitled to the immediate possession as fully as she would be under a deed. The rights being the same, whether by dower or by deed, like consequences should follow both. *Eadem ratio, idem lex.*—Broom's Max. p. 64, marg. Reasonable satisfaction may be recovered for the use and occupation of land in this State.—Rev. Code, § 2707; see, also, *Slatter v. Meek*, 539, 528. And in such case, where there is no special rule in equity, the rule at law will be followed. *Equitas sequitur legum.*—1 Story Eq. § 64, *et seq.* The possession of the complainant having been obstructed by the appellant, Irvine, she was entitled to some damages.—Sedg. on Dam. 133, *et seq.* There was no error, then, in the reference to the master to make inquiry of this damage, and report the same to the court. As this report was made, and not objected to before its confirmation in the court below, it is too late to raise the objection here for the first time. *Gerald v. Miller's Distributees*, 21 Ala. 433; *Lang v. Brown*, 21 Ala. 179; Rev. Code, §§ 3387, 3389. Unless the decree of reference upon its face showed error, there can be no doubt of the propriety of the reference.—*Springle's Heirs v. Shields & Paulding*, 17 Ala. 295. In *Beavers & Jamison v. Smith*, (11 Ala. 20, 32,) it is said that "damages are properly the mean profits arising *after* the death of the husband and *before* the suit for dower. * * * But whatever may be the rule at law, in equity the established doctrine is to allow the widow the *mean profits as damages*,

and this not by analogy to the allowance of damages under the statute of Merton, but on the grounds of title." *Ib.* p. 32. This intimation also comports with the language of our statute, which gives the owner of lands in this State "reasonable satisfaction for its use and occupation."—Rev. Code, § 2607. The alienee who obstructs the widow's right to her dower lands, under our statute, can not claim to stand on a better footing than the heir. Her title is the same against both of these, and either, as he may have the seizin and occupancy of the dower lands, may put her in possession immediately upon the death of the husband, if he chooses.—*Johnson, adm'r, v. Neil and Wife*, 4 Ala. 166. In this case, the appellant's possession from the death of the husband was continuous up to the filing of the bill, and afterwards until the allotment of the dower. He had enjoyed the use and occupation for the whole of this period. The same law which gives compensation after the filing of the bill for the use and occupation, also gives it before the bill is filed. The alienee could only be charged with damages for the use and occupation of the widow's dower during the period of his tenancy. This is what the chancellor decreed, and it is what the master ascertained and reported. The judgment is therefore right, and it will not be disturbed.

The decree of the court below is affirmed ; and the appellants will pay the costs in this court and the court below.—Rev. Code, §§ 2779, 3471.

McCULLOUGH vs. TALLADEGA INS. CO.

[ASSUMPSIT ON WRITTEN OBLIGATION TO PAY MONEY.]

1. *Corporation ; when may plead nul tiel corporation.*—A corporation, when sued on a contract made by it, cannot plead *nul tiel corporation*, unless in case of misnomer or dissolution.
2. *Private corporations ; books of, competency as evidence.*—The competency as evidence of the books of a private corporation is not destroyed because they had been for some time in the possession of the attorneys of the corporation, who brought them into court and delivered them to the attorneys of the opposite party, for use as evidence in the pending trial, there being no suspicion or claim of fraud on their part.
3. *Same ; when may be sued on obligation for borrowed money.*—A private corporation, authorized to "borrow money, and issue their bonds therefor," may be sued on the obligation they give for the re-payment of money borrowed, whether it be under seal or not.

APPEAL from Circuit Court of Talladega.
Tried before Hon. CHARLES PELHAM.

The facts appear in the opinion.

TAUL BRADFORD, for appellant.—1. The books of the Talladega Insurance Company were competent evidence, under the plea of "*nul tiel corporation*." By these the plaintiff expected to prove, in part, acceptance of the charter, as they showed acts of "user" by the corporators. The manner in which the books were brought into court did not affect the case, for it was only incumbent on the plaintiff to *identify* the books.

2. The case of *Sanders v. Talladega Insurance Company*, 43 Ala. p. 115, is decisive of this case.

The right to borrow money, and to give a written promise to repay it, is clearly conferred upon the company, as may be seen by the actual grant of powers, and the restriction upon the exercise of certain banking powers, not conferred by the charter.

JOHN T. HEFLIN, *contra*.

(No brief for appellee came to Reporter's hands.)

B. F. SAFFOLD, J.—This suit was assumpsit on a written contract or obligation to pay money, brought by the appellant against the appellee. The defendant pleaded the general issue and *nulliel* corporation. The court erred in not sustaining the demurrer to the last plea. I have not been able to find any authority for such a use of the last plea by the corporation. It has to appear in some way to make it; and being present, it pleads that it does not exist. Our statute law assimilates a private corporation, as nearly as possible, to a person; and the substance of such a plea seems necessary or permissible only in cases of misnomer or dissolution, and in the form and manner required in the case of a person.

Besides, as a person who has dealt with a corporation as such is estopped from denying its existence in that matter, so should a corporation who has so dealt with an individual.

The books of the company were competent evidence for the plaintiff, and the court erred in its refusal to permit them to be introduced. Formerly the rule was that a party could not be compelled to produce his private books and papers in obedience to a *subpœna duces tecum*, on the ground that it was requiring him to give evidence against himself, or in his own case. As the parties to a suit are now competent witnesses, and the production of papers may be coerced by subpœna from such, the rule no longer exists. The fact that the books had been for some time in the keeping of the attorneys of the company, who had used them as evidence in behalf of the company in another cause, and that they had brought them into the court-house, during the pendency of this trial, and delivered them to the plaintiff's counsel, did not destroy their competency, there being no suspicious circumstances attendant. Independently of these books, the evidence of the acceptance of the charter

and user under it, was amply sufficient.—*Talladega Insurance Company v. Landers*, 43 Ala. 115.

One of the powers expressly conferred upon this company by its charter, was that to borrow money and issue their bonds therefor. It is claimed for these bonds that they must be sealed instruments. If so, section 9, Revised Code, provides that when by law a bond is required, an undertaking without seal is sufficient, and must be taken in all respects as if the same was a sealed instrument. But I imagine the bonds intended are such writings as are customary and sufficient for the purpose among business men. Unless the act of incorporation expressly prescribes the contrary, the duly authorized agents of the corporations, as of natural persons, may, within the scope of their authority, bind them by simple as well as by sealed contracts. In *The Bank of Columbia v. Patterson*, 7 Cranch, 299, the United States supreme court went the whole length of giving the same remedies against incorporated companies, in matters of contract, as against individuals.—Angell & Ames on Corp. §§ 292, 379; *Talladega Ins. Co. v. Landers*; *supra*.

The judgment is reversed and the cause remanded.

[NOTE BY REPORTER.—At a subsequent day of the term, appellee applied for a re-hearing, but the application did not come into the Reporter's hands. The following response was made :]

SAFFOLD, J.—We do not think section 9, Revised Code, is confined to the restricted meaning contended for by the appellee. But the decision was not based on that issue.

The authorities cited in favor of the right to plead *nul tiel* corporation, were examined before preparing the opinion. The right to plead that a certain act was beyond the scope of the powers of the corporation is different from a plea that the corporation does not exist.

A re-hearing is denied.

THORNTON *vs.* KYLE.

[APPEAL FROM ORDER OF CHANCELLOR SUSTAINING A DEMURRER TO CROSS-BILL
FOR WANT OF EQUITY, &C.]

1. *Appeal; when does not lie.*—An appeal cannot be taken from an order of the chancery court sustaining a demurrer to a cross-bill, filed by way of an answer to the original bill, and dismissing such cross-bill, before the final determination of the cause.
2. *Same; what case does not fall within influence of section 3486 of the Revised Code.*—Such a case does not fall within the relief of the section of the Revised Code allowing appeals from certain interlocutory judgments and decrees, before the final determination of the cause.

APPEAL from Chancery Court of Cherokee.

Heard before Hon. B. B. McCRAW.

The facts are stated in the opinion.

FOSTER & FORNEY, for motion.

W. J. TURNLEY, *contra*.

PETERS, J.—This is an appeal from the judgment of the learned chancellor in the court below, on a demurrer to the cross-bill.

The cross-bill was assailed by demurrer for want of equity. The demurrer was sustained and the cross-bill dismissed. From this order dismissing the cross-bill, the complainant therein appeals to this court, and assigns the order of dismissal as error. The appellees refuse to join in error in this court, and move to dismiss the appeal, as prematurely taken before the final determination of the cause.

This identical question was settled by this court in the case of *Parish, administrator, v. Galloway*, 24 Ala. 163. It is, however, now contended by the appellant that this case has been overruled by the later case of *Brooks v. Woods*, 40 Ala. 538. This seems to be a misapprehension of the

Thornton v. Kyle.

latter determination. The court there say: "The appellee joins in the assignments of error, and this case is not like *Parish, adm'r, v. Galloway*, 24 Ala. 163."—40 Ala. R. 540. This is not a disapproval of the former case, but rather a reaffirmance of it. We think the case in 24 Ala. 163, was rightly decided. Here there was no joinder in error before the motion to dismiss. The cases are, therefore, identical. The statute allowing interlocutory decrees to be appealed from does not comprehend this case. That statute is in these words: "An appeal to the supreme court may be taken before the final determination of the cause, from any judgment or decree overruling a motion to dismiss a bill for want of equity, or overruling a motion to dismiss or quash an attachment or sustaining a demurrer to a plea in abatement to an attachment, or sustaining an attachment against matters set up in abatement of it, either in the way of an agreed case, or by plea or otherwise; but such appeal shall be taken only after the consent of the opposite party or his attorney is obtained to its being taken; and on the trial of such appeal, there shall not be a reversal, if the supreme court discovers that the defect or error alleged or insisted on can be removed or remedied by amendment under existing laws."—Revised Code, § 3486. In this case there was no consent to the appeal, and it could not be taken under this statute. Besides, it was not such a judgment as comes within the statutory description.

An appeal is not a matter of practice in which this court can prescribe the rule to allow it; but it is a matter of right given by the statute. If there is no statute allowing the right, it does not exist.—Rev. Code, §§ 3485, 3486. In this case there is no such statute. We therefore feel reluctantly compelled to grant the motion dismissing the appeal. And the appellant will pay the costs of this motion, and the costs of the appeal in this court and in the court below.

GRADY *vs.* WOLSNER.

[ACTION ON THE CASE FOR DAMAGES.]

1. *Nuisance ; what is.*—A cooking range or stove erected so near to the partition wall of two houses as to injure, by its ordinary use, the goods of the adjacent proprietor, and render his house uncomfortable and disagreeable, is a nuisance.
2. *Same ; action on the case for, lies against whom.*—An action on the case lies against him who erects a nuisance, and also for its continuance, though he has leased it to another.

APPEAL from the Circuit Court of Mobile.

Tried before Hon. JOHN ELLIOTT.

This was an action on the case for damages, by the appellee against the appellant. The appellant erected in his house, adjoining the appellees, a cooking range or stove so near to the partition wall that the ordinary use of the range or stove injured the appellee's goods, as well as his building, and his business, by making his room uncomfortable and disagreeable to stay in, and thereby drive away customers from appellee, who kept a bar, &c. After erecting the range or stove, appellant let the premises to a tenant who built fires in the range or stove, whereby the appellee sustained the injury complained of to his goods and house. At the time the range was erected appellee objected, and informed Grady that the use of the range would destroy appellee's business and drive off his customers.

The appellant excepted to the refusal of the court to charge the jury, that if they believed appellant had leased his house and had no control of it or the tenants, and did not build the fires, then they must find for the plaintiff.

BOYLES & OVERALL, for appellant.—The range in itself is no nuisance.

Suppose a man erect a building for a slaughter-house or a livery stable in immediate proximity to a private dwelling, and never use it as such, could he be proceeded

Grady v. Wolsner.

against for a nuisance? And if he should rent it out, without specifying any particular purpose for which it should be used, could the owner be proceeded against in case the tenant should use it in such a manner as to become a nuisance?

The mere suggestion is counter to the first dictates of common justice.

In the case of *Vason v. City of Augusta*, 38 vol. Ga. R., the court says: The landlord is not liable for a nuisance maintained by his tenant during the period of the lease. He is liable for a nuisance which exists upon the premises at the time he makes the lease. But if the tenant continues the nuisance he, alone, is liable."

POSEY & TOMPKINS, *contra*.

(Appellee's brief did not come into Reporter's hands.)

B. F. SAFFOLD, J.—That the action will lie is plain. Every one must use his own so as not to hurt another. One who negligently keeps his fire so that his neighbor's house is burned is liable to him for damages, because he had it not in his power to make him covenant to be careful. It matters not whether the fire be in his house, his curtilage, or his close.

The action lies against him who erects a nuisance, and notwithstanding a recovery for the erection, it may afterwards be maintained against him for the continuance, though he has made a lease of it to another. He transferred it with the original wrong, and his demise affirms the continuance of it. He also has rent as a consideration for the continuance, and, therefore, ought to answer the damage it occasions.—2 Salkeld's R., *Rosewell v. Pryor*, 460; 1 Salk. 13, *Tuberville v. Stamp*; 1 Salk. 19. Anything constructed on a person's premises which, of itself, or by its intended use, directly injures a neighbor in the proper use and enjoyment of his property, is a nuisance.

The judgment is affirmed.

DEMPSEY, HARREL & CO. *vs.* STAPLETON, ADM'R.

[ACTION ON PROMISSORY NOTE.]

1. *Administrator of an administrator ; what can not recover.*—The administrator of an administrator is not entitled to recover money due on a promissory note which was made payable to his intestate, but was really assets of the first estate, without proof that his intestate had accounted for it, or been charged with it on settlement.
2. *Separate statutory estate ; what constitutes part of corpus of.*—The rents and profits of land subject to the quarantine of a widow, belong to the *corpus* of her separate estate.

APPEAL from Circuit Court of Henry.
Tried before Hon. J. McCaleb Wiley.

Stapleton, as the administrator of Odom, sued the appellants on a promissory note made by them in favor of his intestate. Under the pleas of the general issue and payment, it was shown that the note was given for a balance due on a purchase of cotton made by the defendants from Odom. The cotton was produced on the lands of the estate of Gunn, of which Odom was the administrator, and at a time when Mrs. Gunn, who had intermarried with Odom, was entitled to her quarantine in the lands. Under these circumstances, and before the appointment of an administrator of Odom's estate, the defendants paid the money to Mrs. Odom. The cotton was regarded by Odom as the property of the estate of Gunn.

The court charged the jury, that if they believed the evidence, they must find for the plaintiff, and the defendants excepted.

W. C. OATES, for appellant.

J. A. CORBITT, and SEALS, WOOD & ROQUEMORE, *contra*.

B. F. SAFFOLD, J.—The proof does not tend to establish any right in the plaintiff to recover the money. His intestate does not appear to have accounted for it. It

Ex parte Thornton.

either belonged to the estate of Gunn, in which case an administrator *de bonis non* of his estate is the proper person to sue, or to his widow. If her quarantine was not otherwise settled, she might have recovered its value from the representatives of her husband's estate by a suit at law, as the *corpus* of her separate estate.—*Boynton v. Sawyer and Wife*, 35 Ala. 497. If the money now sued for was a part of it, it was properly paid to her.

The charge that the jury must find for the plaintiff, was erroneous.

The judgment is reversed, and the cause remanded.

EX PARTE THORNTON.

[APPLICATION FOR MANDAMUS TO COMPEL REINSTATEMENT OF A CROSS-BILL, WHICH WAS DISMISSED BEFORE THE FINAL DETERMINATION OF THE CAUSE.]

1. *Revised Code*, §§ 3367-8; *what requires as to cross-bill allowed by*.—The statute of this State, which allows an answer to a bill in chancery to be turned into a cross-bill, requires that such cross-bill shall be heard at the same time as the original bill, whether the same be heard upon demurrer or upon the merits.—*Revised Code*, §§ 3367-69.
2. *Mandamus; proper remedy to compel reinstatement of cross-bill dismissed before final determination of cause*.—And as no appeal lies from an order of the chancellor dismissing such cross-bill, before the final determination of the cause, *mandamus* is a proper remedy to compel the setting aside of such an order of dismissal and the restoration of such cross-bill upon the docket, to abide the final determination of the whole cause.

This was an application for *mandamus*, based upon a state of facts which are fully set forth in the opinion.

M. J. TURNLEY, *pro motion*.
FOSTER & FORNEY, *contra*.

Ex parte Thornton.

PETERS, J.—This is an application by Robert S. Thornton for a rule to be directed to the honorable chancellor of the eastern chancery division of this State, sitting for the county of Cherokee, to show cause why a peremptory *mandamus* shall not be issued against him in order to compel him to reinstate on the docket of the chancery court of said county of Cherokee a certain cross-bill filed by said Robert S. Thornton on the 23d day of November, 1870, to the original bill of complaint of Mary A. Kyle, by her next friend Robert B. Kyle, complainant, against said Robert S. Thornton and Nat. M. Thornton, as the administrators of the estate of Ann C. E. Thornton, deceased, defendants, filed on the 14th day of September, 1870, in said chancery court of said county of Cherokee, which said cross-bill was dismissed out of said court on the third day of February in the year 1871, on demurrer, by order of the learned chancellor of said court.

The allegations of the petition for *mandamus* show that Mary A. Kyle, by her next friend Robert B. Kyle, filed her bill of complaint in the chancery court of Cherokee county in this State, on the 14th day of September, 1870, against Robert S. Thornton and Nat. Macon Thornton, as the administrators of the estate of Ann C. E. Thornton, deceased, and on the 23d day of November, 1870, said Robert S. Thornton filed his answer to said bill of complaint, and therein, by way of cross-bill, prayed relief against said complainant for certain causes connected with or growing out of the subject matter of said original bill, as in said cross-bill is shown and set forth, as allowed by law. To which said cross-bill, by way of answer thereto, the said complainant in said original bill demurred for want of equity. This demurrer was heard on the 3d day of February, 1871, before the final determination of said cause, and the same was sustained, and said cross-bill was dismissed out of said court, and the said Robert S. Thornton was taxed with the costs of said cross-bill.

The Revised Code declares that, "the defendant may obtain relief against the complainant for any cause connected with or growing out of the subject-matter of the

Ex parte Thornton.

bill, by alleging in his answer, and as a part thereof, the facts upon which such relief is prayed, and require the complainant to answer the same upon oath.”—Rev. Code, § 3367. And that, “the matter thus put in issue must be considered in the nature of a cross-bill and be heard at the same time as the original bill.”—Rev. Code, § 3368. The language of this statute is general and peremptory, and it does not permit that the cross-bill shall be heard, whether upon demurrer or upon the merits, earlier than the hearing of the original bill. This statute creates a new rule as to the hearing of demurrers to cross-bills, else the hearing of the cross-bill may be improperly defeated. The 69th rule of chancery practice does not apply to such a case.—Rev. Code, p. 833, rule 69. The purpose of the statute is to keep the cross-bill in court until the original bill is heard. The learned chancellor, therefore, mistook the proper practice in dismissing the cross-bill before the hearing of the original bill. There is no appeal in such a case. *Thornton v. Kyle*, at the present term, 24 Ala. 163. It is the right of the party filing a cross-bill by way of answer, to have the cross-bill heard at the same time as the original bill. This right cannot be enforced except by writ of *mandamus*. Therefore, let the rule issue according to the prayer of the petitioner’s application, requiring the honorable chancellor of the eastern chancery division of the State of Alabama to set aside said order of dismissal of said cross-bill, and to reinstate and restore said cross-bill to the docket in said court, or appear at first day of the next term of this court and show cause why he has not done the same, and why a peremptory *mandamus* shall not issue, &c.

HIGHTOWER vs. MOORE.

[APPLICATION TO REQUIRE ADMINISTRATOR TO GIVE ADDITIONAL BOND.]

1. *Surety on administration bond ; what liability of, not discharged by.*—The liability of a surety on an administrator's bond is not discharged by his death, although the default occurred afterwards.
2. *Decree ; when will not be reversed.*—A decree of the probate court on the facts of a case, will not be reversed when the evidence on either side is pretty evenly balanced.

APPEAL from Probate Court of Russell county.

Tried before Hon. T. L. APPLEBY.

The appeal is taken from the refusal of the probate court to require the appellee, as administrator, to give a new bond. The proof is, that the administrator himself and one of his sureties are virtually insolvent. Another one is apt to pay his debts, but his means are extremely limited. The third is dead and his estate has been distributed, but it was worth between fifteen and twenty thousand dollars. The estate of the intestate has been administered, except some land proposed to be sold for distribution, and valued at about \$23,000, which it was proposed to sell on a credit.

G. D. & G. W. HOOPER, for appellant—Contended that the word "may" in the Revised Code, in relation to the removal of administrators, was *mandatory*, and must control the court ; that the facts of the case forbid the exercise of any discretion by the probate judge against the removal of the appellee.—17 Ala. 527 ; 43 Ala., *Ex parte Chase*.

No appearance for appellee.

B. F. SAFFOLD, J.—As the land will probably be sold on terms of credit, payable in installments, the security may be sufficient. The estate is so nearly administered and distributed that the risk is much abated. In *Moore v. Wallis*, 18 Ala. 458, it was held that the liability incurred

Benton v. Taylor.

by the surety on a guardian's bond is not discharged by his death, although the default occurred afterwards. There is therefore the security of this estate, and it is not probable that the administrator will receive more of the purchase-money of the land, before he can be made to account for it, than there is protection for. On the presumption in favor of the judgment of the probate court in matters of fact, we sustain this decree.

The decree is affirmed.

BENTON *vs.* TAYLOR.

[CERTIORARI.]

1. *Certiorari, when will not be granted.*—A *certiorari* will not be granted at the instance of an individual tax-payer, and in his name, to revise the proceedings of the court of county commissioners appointing an agent "for the issuing of the rations to the indigent persons of the county," and ordering his payment out of the county treasury.

APPEAL from the Circuit Court of Randolph.

Tried before Hon. CHARLES PELHAM.

IN January, 1866, the commissioners court of Randolph county made an order appointing appellee agent for the distribution of rations to the poor and indigent of the county. In April, 1867, an order was made to pay appellee eighty dollars a month, out of the county treasury, for his services for ten months, and the appellant, a citizen and tax-payer of Randolph, filed his petition in his own name alone, in the circuit court, alleging that the sum allowed appellee for his services would have to be raised by taxation, some of which would be assessed and collected out of his property, and prayed that appellee be made a defendant to the petition, and that the commissioners court

be required to certify its proceedings in the matter to the circuit court, and that upon the hearing said orders be quashed, &c. The circuit judge ordered the *certiorari* to issue, and on the hearing the appellant moved the court to quash the orders, &c., of said court of county commissioners, which motion the court overruled, and rendered judgment against appellant for costs. To the action of the court in overruling his motion to quash, and to the judgment of the court, appellant excepted, appeals to this court, and here assigns same as error.

JOS. AIKEN, for appellant.

C. D. HUDSON, *contra*.

(No briefs came into the Reporter's hands.)

PECK, C. J.—A *certiorari* is a revisory writ, and may be issued by a superior, to correct the erroneous action of an inferior court, where the law has provided no remedy by appeal; but a party who seeks the aid of this writ must show that he has some direct interest in the proceedings sought to be revised, and has been injured by them. *Lamar v. Commissioners Court of Marshall*, 21 Ala. 772; *Comm'rs Roads and Revenue Talladega Co. v. Thompson*, 15 Ala. 134; *Ex parte Keenan*, 21 Ala. 558; *Cushing v. Gray*, 10 Shepley's Rep. 9; *In re Mount Morris Square*, 2 Hill's Rep. 14; *Petty v. Jones*, 1 Iredell, 408; *Cotton v. Clark*, *ib.* 353.

The appellant shows no interest in the proceedings of the commissioners court in this case; neither does he show that he has sustained any injury thereby that is not common alike to every tax-payer in the county. This is not sufficient to authorize him to interpose, in his own name, to revise the proceedings of that court, even if they be admitted to be erroneous. But, so far as we can see, there is no error in the proceedings that the appellant seeks to set aside. They consist of two orders, the one appointing the appellee an agent of Randolph county "for the issuing of the rations to the indigent persons of said county,"

made in January, 1866 ; and the other, directing his payment out of the county treasury, made in April, 1867.

We know as a historical fact, that at the close of the late rebellion, and for a long time afterwards, in many parts of the country a large portion of the people, white and black, were suffering from destitution, and many in great danger of perishing by starvation. So great and general was this evil, that the public authorities of the State found it necessary to provide supplies for their relief. Thereby it became necessary to have agents to take care of and distribute the supplies so provided.

The commissioners courts, being charged with the care of the poor, very properly appointed agents for that purpose, in their respective counties, and ordered them to be paid out of the county treasury. At the time the appellee was appointed the agent for Randolph county, we are not aware of any statute that expressly authorized the commissioners court to make the order, but we hold that the urgency of the case warranted the action of said court in the premises ; but before the order was made directing his payment, an act was passed, entitled "An act to provide for the distribution of supplies to the destitute, and to provide for the punishment of officers and others for their misapplication," approved February 19, 1867. By this act it was made the duty of the court of county commissioners to appoint an agent for their respective counties, and made it the duty of agents so appointed to receive all supplies furnished by the State for the destitute, and to distribute the same as provided by said act ; and said courts were also required to make reasonable allowances out of the county treasuries for the payment of said agents. Acts 1867, p. 704, §§ 1-7. This act, although passed after appellee's appointment, fairly interpreted, shows the propriety of the course pursued by the commissioners court, and justifies the order for the payment of appellee as agent, &c., out of the county treasury. We think, therefore, the *certiorari* in this case was unadvisedly issued, and consequently the court below committed no error in over-

Mobile & Ohio Railroad Company v. Malone.

ruling appellant's motion to quash said orders of the commissioners court.

Let the judgment be affirmed, at appellant's cost.

MOBILE & OHIO RAILROAD COMP'Y vs. MALONE.

[TRESPASS FOR KILLING CATTLE, &C.]

1. *Railroads ; sections of Revised Code in relation to ; how construed.*—The sections of the Revised Code upon railroads are to be construed as one law, and taken together as a whole.
2. *Railroad companies ; when liable for stock killed, &c.*—Railroad companies, in this State, are liable for damages for killing or injuring stock by their locomotives and cars, if they fail to comply with the requirements of caution prescribed in the Revised Code, when such compliance is within the power of their engineers or agents.
3. *Same ; what diligence must be shown to relieve from liability.*—But if these requirements can not be complied with, the company is bound to show that their agents or servants used all the means in their power, under the circumstances, known to skillful engineers, to prevent the injury complained of. When this is shown the company is not liable.
4. *Claim, presentation of ; what sufficient.*—Proof that the auditor of the company had frequently acted as depot agent and received and paid claims for stock killed, there being no proof that there was any depot agent at the place where the claim was presented, shows a sufficient compliance with the Revised Code, requiring claims for stock killed to be presented in writing in sixty days to the president, treasurer, superintendent or some depot agent of the corporation.

APPEAL from Circuit Court of Mobile.

Tried before Hon. JOHN ELLIOTT.

The facts are fully stated in the opinion.

GEORGE N. STEWART & P. HAMILTON, for appellant.

WM. BOYLES, *contra*.

(No briefs came into Reporter's hands.)

PETERS, J.—This is an appeal from a judgment of the circuit court of Mobile county, which was rendered at the spring term thereof, in 1869. The railroad corporation brings the appeal to this court. The appellee, Malone, obtained a judgment below for one hundred dollars and costs. The action was trespass for killing four cows, the property of said Malone, by the cars and locomotive on said railroad, in this State, while said cars and locomotive were proceeding on the roadway of said corporation in the ordinary business of said company. This cause, on the trial below, turned upon the charge of the court. That portion of the charge necessary to be noticed, was to the effect that, “this case was governed by § 1406 of the Revised Code; and under that section it was necessary, to entitle the plaintiff to recover, that it should be proved that the cattle were killed by the cars of the company while running, that the plaintiff owned them, and the value of the cattle killed, and nothing more.” This charge was excepted to, and made a part of the record as required by law.

The sections of the statute of this State, which govern this action and control the liability of the appellant, said railroad company, are in the following words, that is to say : “§ 1399. The engineers or other persons having control of the running of a locomotive on any railroad in this State must blow the whistle or ring the bell at least one-fourth of a mile before reaching any public road-crossing, or any regular depot or stopping-place on such road, and continue to blow such whistle and ring such bell, at intervals, until he passes such road-crossing, and until he reaches such depot or stopping-place. He must, also, blow the whistle or ring the bell immediately before and at the time of leaving such depot or stopping-place. He must, also, blow the whistle or ring the bell before entering any curve crossed by a public road on a cut where he can not see at least one-fourth of a mile ahead, and approach and pass such crossing, in such cut, at such moderate speed as to prevent accident in the event of an obstruction at the crossing; he shall, also, be required to blow the whistle or

ring the bell on entering into the corporate limits of any town or city, and continue to do so until he has reached his destination or passed through such town or city; he must, also, do the same on leaving such town or city. He must, also, on perceiving any obstruction on the track of the road, use all means in his power known to skillful engineers, (such as the application of his brakes and the reversal of his engine,) in order to stop the train." * *

"§ 1401. A railroad company is liable for all damage done to persons, stock or other property, resulting from a failure to comply with the requirements of § 1399, (1204a) or (from) any negligence on the part of such company or its agents; and when any stock is killed or injured, or other property damaged or destroyed by the locomotive or cars of any railroad, the burden of proof in any suit brought therefor is on the railroad company to show that the requirements of § 1399, (1204a) were complied with at the time and place when and where the injury was done."

"§ 1406. Wherever any live stock or cattle of any description shall be killed or injured by the cars or locomotives of any railroad in this State, the corporation owning such railroad shall be liable to the owner for the value thereof, if killed, or the damage thereto if injured."—Rev. Code, §§ 1399, 1401, 1406.

There is another section of the Revised Code which bars such claims, if not presented in writing to the president, treasurer, superintendent, or some depot agent of the corporation sought to be charged, or unless suit is brought within sixty days after the claim accrues.—Revised Code, § 1402.

From the foregoing statement and an examination of the statutes digested into the Revised Code, it will be seen that the law, as there found, contains parts of several acts, passed before 1860, which bear on this case. The act of 1852, which is found in § 1406 of the Revised Code, made the liability of the railroad company for the killing and injury of stock by their cars and locomotives absolute, whatever diligence might be used to avoid it.—*Nashv. & Chat.*

Railroad Company v. Peacock, 25 Ala. 229. But the act of 1858, which is contained in §§ 1399, 1400, 1401 of the Rev. Code, makes the company liable only when their agents fail to take the precautions prescribed by that statute, or when they have been guilty of negligence. These sections, construed together, necessarily modify each other.—*Nashville & Decatur Railroad Co. v. Comans*, 45 Alabama, p. 437. The act of 1852 made the corporation liable for damages on account of the acts of its agents and servants, and the act of 1858 greatly modified the circumstances under which such liability could be enforced.

All railroad companies, as common carriers, are liable for negligence. They are also liable under the law above quoted when they act in that capacity.—Redf. on Common Car. p. 27, § 37, *et seq.*; *Selma & Meridian Railroad Co. v. Butts & Foster*, 43 Ala. 385. But this is quite a different liability from that insisted on in this action. Here the railroad company did not act as the carrier of the stock killed. It is contended that the company acted as a wrongdoer and a trespasser.

The corporate powers give the company no authority to kill stock or to injure it, because it is found on the track of the road-way. If it did, this would be a license. And a party justifying under a license must show it. This would be so, even without the statute.—1 Greenl. Ev. §§ 74, 81; Rev. Code, § 1301, *supra*. To kill one's stock, even a dog, is a trespass, and it renders the party who does the act of killing a trespasser, if he has no legal excuse. The legislature has extended this liability to railroad corporations, when the act complained of has been done by their servants and agents. And if the killing is not accidental, the question is not one of diligence or negligence, but of right to kill or injure the stock that may be on the road. To give such a right there must be law for it, or the trespass can not be excused.—9 Bac. Abr. (Bouv.) *Trespass*, p. 438; *Parker v. Wise*, 27 Ala. 481; *Rhodes v. Roberts*, 1 Stewart, 145; *Lindsay v. Griffin*, 22 Ala. 629; 3 Bac. Com. 208.

It may, however, be said, that a railroad company is an artificial person, and is entitled to the same defenses that

a citizen could make. They have duties to perform which are not only important to the corporation, but also to the public. And in the necessary performance of the duties imposed upon them by law, the legislative authority of the State intends to grant them immunity for such accidental injuries as may accrue, in the prosecution of their business, without fault on their part. And at the same time this authority has prescribed the requirements of the precaution necessary to be used, in order to free the company from fault. The corporation, then, must show that its agents or servants did use *all the means in their power*, known to skillful engineers, to prevent the disaster; that is, that the brakes were properly used; the engines were reversed, to slacken the speed of the train; and the whistle blown or the bell rung, to scare the stock from the track, and to give it every possible moment to escape, without endangering the safety of the train; or that all this was impossible and unavailing, or could not have been done more completely than it was done under existing circumstances. The train need not be "stopped." But it should be "slowed," (if possible, and safe to the train,) and its velocity should be abated, in order to give the stock time to move off from the railway track. When this is not done, when it is possible and safe for the train to do it, then there is a *failure* to comply with the requirements of the statute, and the corporation becomes liable for the damages. But this point does not necessarily arise in this case, as there is no proof of any attempt to arrest the speed of the train, or to scare the stock from the road-way, by the whistle or the bell. The proof is, that it was impossible to "stop" the train, after the cattle were discovered on the track of the road, before the collision took place which destroyed them. The passenger trains on our railroads move at a velocity of about twenty miles in an hour, or at the rate of a mile in three minutes. The bill of exceptions shows that the cattle were first discovered on the road about seventy-five yards ahead of the locomotive, and that it required about three hundred yards running "to stop the train." Then the engine might have been "slowed" about one-fourth

of its speed in seventy-five yards. This might have allowed the cattle time to have escaped, and to have been saved to the owner. This, it seems, the law requires shall be done, or attempted.—*Gr. W. R. R. Co. v. Geddis*, 33 Ill. 304.

All the sections of the Revised Code on railroads are upon the same subject-matter, and were enacted as a whole on the adoption of the Code. Therefore, they constitute one law. Thus construed, section 1406 is subject to the same limitations with section 1401, and both these are controlled by section 1399.—*Nashville & Decatur R. R. Co. v. Comans*, 45 Ala. 437.

The evidence of the presentation of the claim to Beers, as shown in the bill of exceptions, was sufficient. It ought not to have been rejected. The testimony of the witness was, that Beers "had acted as an agent of the company at their depot in Mobile, and that he (witness) had before frequently presented such claims to said Beers, who received them, and that such claims had been paid." It was shown that Beers was the auditor of the company, but it was not shown that the company had any other depot agent in Mobile. This testimony, so far as it went, was certainly competent to show whether Beers was acting as depot agent or not, at the time the claim was presented. If he was, then the presentation was sufficient. These were facts that the jury were authorized to find, and this evidence tended to establish them. It is not known to the court that the offices of depot agent and auditor of the railroad company are incompatible, so that the same person may not discharge the functions of both at the same time. But when there is a known person filling the offices designated by the Code, as the individuals to whom such claims as that sued on in this case should be presented, in order to save it from the effect of the bar, then the claim, in writing, should be presented to some one of these officers within the time limited by law. When, however, there is no such person known to be such officer of the company, then any one acting as such, with the sanction of the company, would be sufficient. The company may have the duties of any of its offices temporarily discharged by any competent person, and such

temporary officer can bind the company, while acting within the scope of his powers.—*Levi v. Lynn & Boston Railway*, 11 Allen, 300.

This view of the law in this case leads me to the conclusion that the learned judge in the court below mistook the proper construction of the statute above recited. The judgment of the court below is therefore reversed, and the cause is remanded for a new trial.

RANDOLPH COUNTY vs. HUTCHINS.

[JUDGMENT BY DEFAULT AGAINST COUNTY IN ACTION OF ASSUMPSIT.]

1. *County; may be sued in same manner as natural person.*—A county is a body corporate in this State, and it may be sued in the same manner that a natural person may be sued, by one who has claims against it, if no other provision is made for their payment.—Rev. Code, § 2558.
2. *Same.*—In such a suit, judgment by default may be taken against the county, if the suit is not defended.
3. *Same.*—A judgment, thus taken, will not be set aside on appeal to the supreme court, if it is founded on county warrants, issued for claims presented and allowed, for services rendered the county, and a stated account, when the only objection to the judgment, assigned as error, is that the complaint fails to show a sufficient cause of action, and the complaint, though inartificially drawn, shows a substantial cause of action.
4. *Judgment by default against county; what service sufficient to authorize.*—A judgment by default against a county, founded upon service of process, which shows that the summons was “executed” by the sheriff, without also showing upon whom the service was made, is not erroneous, for this reason.

APPEAL from Circuit Court of Randolph.
Tried before Hon. CHARLES PELHAM.

The facts are fully stated in the opinion.

BINTOW & AIKEN, for appellant.
C. D. HUDSON, *contra*.

PETERS, J.—I have not been able to discover any sufficient ground for the allowance of the motion made by appellee, to dismiss the appeal in this case. The proceedings in taking the appeal seem to have been quite regular, and as required by the State. The motion is, therefore, denied, with costs.—Rev. Code, §§ 3485, 3509, 3506, 3507 ; *Campbell v. Roach*, MS. June term, 1870.

This is an action of debt, founded on several claims against the county of Randolph. The complaint and summons are in the usual statutory forms. The summons was signed and issued by the clerk on the 10th day of February, 1868. The sheriff's service of this process is endorsed thereon in the following words, viz : " Received in office, February 13, 1868. Executed, February 14, 1868. S. E. Jordan, sheriff." This writ, with the complaint, was regularly returned into the proper court, and judgment was taken by default, in favor of the plaintiff and against the county of Randolph as the defendant, at the proper term of said court. In this judgment it is recited that the plaintiff recovered " of and from the defendant six hundred and sixty-nine 24-100, the damages in the complaint mentioned, together with costs in this behalf expended." It will be seen that the word " dollars " is left out in this judgment, but this word is inserted in the complaint to which reference is made. This complaint is copied below :

" The State of Alabama, } Circuit Court,
Randolph county. } Spring Term, 1868.

" Zachariah M. Hutchins, plaintiff, *vs.* Randolph County,
defendant.

" The plaintiff claims of the defendant the sum of one thousand dollars, due from said county by account, on, to-wit, the first day of January, 1867 ; also, one thousand dollars on an account stated between the plaintiff and defendant, on, to-wit, the first day of January ; also, one thousand dollars for work and labor done for the defendant by the plaintiff, on, to-wit, the first day of January, 1867, at the request of said county ; also, three hundred and ten dollars on a claim audited and allowed by said

county on the 24th of September, 1866, for hauling supplies to Roanoke, for the destitute of said county, and for which the said plaintiff holds the certificate of said county, dated 24th of September, 1866, for three hundred and ten dollars; also, three hundred dollars on a claim audited and allowed by said county, on the 30th November, 1866, to Joseph H. Davis, for receiving and issuing government rations for the destitute of said county, at Roanoke, Alabama, to-wit, on the 30th of November, 1866, which warrants are the property of the plaintiff, and are due and unpaid; which several sums, with interest thereon, are now due."

This complaint is signed by the attorney for the plaintiff, and accompanied the summons, as required by law. At the trial term of said suit, judgment was taken by default, in favor of said plaintiff against said defendant, as above shown. From this judgment the county appeals to this court, and here assigns the following errors, that is to say:

"1. The court erred in rendering judgment by default against appellant.

"2. The court erred in rendering judgment by default against appellant, because the appellee's complaint shows no cause of action.

"3. The court erred in rendering judgment by default against appellant, because the record shows that service of summons was not legally made on appellant."

The county is a corporation created by law. It is capable of contracting accounts for the business of the corporate body, and may be sued to enforce the payment of the same.—Rev. Code, §§ 896, 907, 908, 909; *Barbour County v. Horn*, MS. June term, 1871; *Covington County v. Kenney*, 45 Ala. 45. When any claims against the county are audited and allowed, the county, through its commissioners court, is authorized and required to levy a tax to raise the money necessary to pay such claims.—Rev. Code, § 919, *et seq.*; *ib.* §§ 922, 926, 930. It is true, that there is a mode prescribed to register claims against the county, and have them paid by the county treasurer; but if they are not allowed and paid in this way, this does not

release the county.—Rev. Code, §§ 922, 926, 930. For if the county were thus released from suit, any claim against the county might be defeated, for want of allowance and registration, if the commissioners should choose to reject it, however just and proper it might be to have it paid. This does not seem to be the purpose of the statute making the county a body corporate, and subjecting it to be sued. In such transactions, either the county is bound or the commissioners are bound.—*Whiteside v. Jennings*, 19 Ala. 784. The commissioners are but the agents of the corporation. If the agent transcends his authority, he is personally liable.—*Crawford v. Barkley*, 18 Ala. 270. All claims must, also, be presented for allowance, within twelve months, or they will be barred by this limitation after the claim accrues, unless they are held “by minors or lunatics.” Rev. Code, §§ 907, 909. If the claim is allowed and registered as required by law, then the treasurer of the county becomes liable to pay it, if he has funds, and may be sued on it if he fails to pay it on demand.—Rev. Code, §§ 926, 930.

But the statute does not declare that even this shall release the county from suit. It only provides one mode for the payment of the claim. And the same statute that provides this, also provides that the county may be sued. Suit, then, is a second mode to enforce the payment. Both these may exist at the same time; they are merely cumulative remedies.

Then, as the county may be sued, and there is no particular mode pointed out for this purpose, the suit may be brought in the usual form, prescribed in other cases for like demands.—Rev. Code, §§ 2523, 2558. This action has been brought in conformity with the general law upon the subject of instituting suits under our Code. The complaint, in this suit, though somewhat irregular in some trifling and amendable particulars, is in sufficient form.—Rev. Code, § 2629; *ib.* p. 674. The judgment against the county, upon a sufficient complaint, is good, if similar to a judgment against a natural person, in a like action. If the defendant fails to plead, he admits the complaint, and

judgment by default may be taken; and if the claim is founded on an instrument in writing, as in this case, the clerk, under the direction of the court, may enter the judgment for the sum shown to be due, and interest.—Revised Code, § 2770. No more than this has been done in this instance. But, at all events, the judgment by default was proper.

The return of the sheriff does not show upon what particular person the summons was served, but it shows that the process was *executed*. This is equivalent to saying that it was *legally executed*. This could only be done by service upon the judge of the probate court, in the manner required by the statute.—Revised Code, § 2573. The judge of the probate court is a person known to the court. There is no need of proof to show that he was the person proper to be served with the summons and complaint, as there would be in the case of a private corporation, where the person to be served is not known to the court. The sheriff is a sworn officer of the State. He knows the law. And he knows the proper person upon whom he should serve process in his hands. In such case, it is to be presumed that he has discharged the duties of his office correctly, unless it otherwise appear.—Broom's Max. p. 428, (marg.); *Bank United States v. Dandridge*, 12 Wheat. 64, 69, 70. The complaint shows a substantial cause of action. There was no objection to it, or to the service of the summons in the court below. When this is the case, the judgment of the court below will not be disturbed or reversed.—Revised Code, §§ 2636, 2637, 2629, 2811.

The errors assigned are not sustained by the record and the law. No others will be noticed.—Shep. Dig. pp. 565, 538.

The judgment of the court below is affirmed.

BARWICK *vs.* RACKLEY ET AL.

[TROVER AGAINST ADMINISTRATOR FOR SALE OF PROPERTY EXEMPTED FOR USE
OF THE FAMILY.]

1. *Property exempted from administration ; when may be sold by administrator.*—The property of a decedent exempted from administration by section 2061, Revised Code, may be sold by the administrator for the benefit of the family, if not needed for their use. But if he sell it without the consent of the family, he is liable for its conversion.
2. *Same ; when widow estopped from suing for.*—The consent of the widow to the sale of such property, in consideration of an invalid agreement with the administrator, is no consent. But a sale at her request estops her from suing for the conversion.
3. *Same ; power of widow to sell.*—The widow, when she is the head of the family, may sell such property, and if the family is to be dispersed she may sell her interest in it without regard to whether it has been set apart or not.
4. *Same ; when guardian liable for conversion of.*—The guardian of an infant member of the family is liable for a conversion, if he sells the child's interest in the property. *Secus*, if the child be withdrawn from the family.
5. *Inventory, &c., of administrator ; when not inadmissible as evidence.*—The inventory and sale bills of an administrator are not inadmissible as evidence, because they were made during the late civil war.

APPEAL from Circuit Court of Henry.

Tried before Hon. J. McCALEB WILEY.

The appellees, Margaret Rackley, formerly widow of James G. Barwick, deceased, in her own right, and G. W. Rackley, as next friend of James R. Barwick, minor child of said deceased, brought this action against Reddin Barwick, the appellant, to recover damages for the conversion by him of certain personal property of said deceased, which they claimed was exempt from administration and sale, for the use of the family.

On the trial it was proved that appellant was administrator of James G. Barwick, who died about 1862, in Henry county, leaving a widow, one of the appellees, since married, and a son (still an infant) by a former wife ; that ap-

pellant, as such administrator, sold all the exempt personal property of his intestate, as well as that not exempt. Appellees, on the trial, offered to introduce as evidence the inventory and bill of sale of said personal property, returned by said administrator, in 1863, to the probate court of Henry county, to which appellant objected, on the ground that the "probate court of Henry county was an illegal court, and its records, orders, &c., void." The objection was overruled and the inventory, &c., introduced, to which appellant excepted. There was also evidence on the part of appellees tending to show the value of the exempted property sold, and that Mrs. Rackley consented to the sale thereof, under an agreement with the appellant that "all the property, personal and real, of decedent should be sold by him, and one-half the proceeds paid by him to her, should the court allow it."

On the part of appellant, it was proved that he paid "Mrs. Barwick one-half of the net proceeds of sale of the personal property belonging to the estate of his intestate, and took her receipt therefor; that the settlement was made in the probate court;" that appellant, as guardian of the infant appellee, bought the dower interest of the widow in the lands of decedent; that she was present at the sale of the personal property, made no objections to it, and bought several articles, and was of age. There was evidence on the part of appellant tending to show that the widow refused to remain on the place, and take charge of and use the exempted personal property of the decedent's estate, but urged and solicited appellant to sell the same and give her in money her portion; that appellant never agreed to give the widow one-half of the proceeds of the sale of the land belonging to the estate of said decedent, but only "such part thereof as the law would allow her." Appellant offered to read in evidence to the jury the depositions of two witnesses about conversations had between the widow and administrator, to which the appellees objected, on the ground that "neither of the witnesses testified that he remembered all of the conversations had at any time between the plaintiff and the defendant. These

witnesses, in their depositions, state in substance that they did hear all the particular conversation about which they testified, but did not hear all the different conversations between Mrs. Rackley and the administrator. The court sustained the objection and ruled out the depositions, to which the appellant excepted.

The court charged the jury, "that if there was a child of deceased, then the widow had no right to sell, until the property exempt by law has been set apart to the widow, and if so sold by her direction or consent, said sale was void, and she can recover in this suit," to which appellant excepted.

Appellant asked the court to charge the jury, "that if they believe, from the evidence, that Mrs. Rackley, the plaintiff, was a joint owner of the property mentioned in complaint with her co-plaintiff, and consented that defendant should sell the said property, then so far as her interest therein is concerned they must find for the defendant."

2. "That if they believe, from the evidence, that Mrs. Rackley was a joint owner with the other plaintiff in the property sued for, then her right and interest therein was absolute, and she had a right to sell or dispose of her interest therein, that if they believed, from the evidence, she sold or consented to the sale of said property, and the same was sold and she received her portion of the proceeds of said sale from the defendant, she can not recover of the defendant her interest originally owned therein.

3. "That if they believe, from the evidence, that the property sued for was sold by the defendant as administrator of James G. Barwick, deceased, and the plaintiff, Mrs. Rackley, being present and consenting to the sale, and that afterwards the said defendant, as said administrator, reported and charged himself with the proceeds of said sale, and that said Mrs. Rackley was a party to said settlement, and received her part or portion of proceeds of sale of said property from the defendant, the said Mrs. Rackley is estopped from recovering for the said interest in this suit.

4. That if they believe, from the evidence, that defendant was and is the guardian of James R. Barwick, the minor

plaintiff, and has accounted as said guardian in his settlement for the proceeds of said sale, to the extent of the interest of said James R. Barwick therein, then the said minor plaintiff can not recover for said interest in this suit."

Each of which charges the court refused, and to each refusal appellant excepted. There was a verdict and judgment against the defendant, and hence this appeal.

The errors assigned are—

1st. Overruling the objection by appellant to the introduction of the records of the probate court of Henry county.

2d. Sustaining objection by appellees to the depositions offered to be read to the jury by appellant.

3d. The charge given by the court.

4th. Refusal to give the four charges asked by appellant.

J. A. CLENDENNIN, for appellant.—The court erred in suppressing the depositions. The witnesses testify to what they heard, and heard substantially all the conversations about which they testified. Even if they did not, it could only affect the weight of testimony, not the competency of the witnesses.

The charge given for the appellee was certainly erroneous. The widow had the right to make the selection both for herself and the child, as the head of the family. It became absolutely the property of the widow and child upon the selection being made, and authorized her to take charge of it, and the law imposes no restriction upon her right to sell or dispose of it, or any part thereof. Her direction and request to the administrator to make the sale of the exempt property, was equal to a selection. The selection is purely a matter with her and the administrator; no form of law for it is prescribed. Under the law the minor was entitled to half of the exempt property when leaving the family. The horse, wagon, and many other articles, could not be divided without a sale thereof. The statute prescribes no particular form or proceeding for the

sale for division. It was not void. The widow and minor were each entitled to one-half of the property which was not exempt to them. The sale was a public sale, the adult plaintiff present and purchasing such articles as she wanted. It does not place her in an enviable attitude to undertake a recovery of the appellant, when her own evidence shows that she received her part of the proceeds of sale. Her mouth is forever closed.—*Morris v. Hall*, 41 Ala. 536, 4th section of opinion.

The appellant was also guardian of the minor plaintiff, and his grandfather. The sale of the minor's interest in the property was not necessarily void. It is a general principle, that when personal property comes into the hands of his ward, other than money at interest, the guardian should sell it and put the money at interest. *Tyler on Infancy*, 262.

The guardian (or appellant) is responsible to the ward on settlement with him, if he has converted his property, or any part, illegally, and the probate court is the forum in which he is liable and should account.

W. C. OATES, *contra*.—The objection to the admission of the probate court records was overruled, and appellant excepted. A specific objection having been made to this testimony, none other can be considered by this court, for he thereby waived all other objections.—*Brown v. Johnson*, 42 Ala.

The probate court of Henry county, in the years 1862 and 1863, although presided over by a rebel judge, was a lawful court for the purpose of granting administration and ordering appraisement of property, receiving and recording inventories, &c.—*Texas v. White et al.*, 7 Wall. 700.

2. The court below did not err in excluding the depositions of the witnesses, Margaret Barwick and Susan E. Lisenby, on the objection of the appellees. The depositions were offered generally as evidence in the cause. One of the appellees (plaintiffs in the court below) was a minor, incapable of consenting to the sale, or of making any admission which was binding upon him. The depositions

of these witnesses only proved the declarations or admissions of the adult plaintiff, and did not show that her co-plaintiff, had he been *sui juris*, was present, or heard, or otherwise knew of her declarations. The depositions were offered, as shown by the bill of exceptions, against both plaintiffs. Such evidence was certainly illegal and inadmissible against James R. Barwick. Where testimony is offered as a whole, a part of which is illegal as offered, it is not error in the court to exclude it.—*West & West v. Kelly's Ex'rs*, 19 Ala. 353; *Smith v. Wooding*, 20 Ala. 324; *Pritchett v. Munroe*, 22 Ala. 501; *Gibson v. Hatchett*, 24 Ala. 201; 27 Ala. 216; 28 Ala. 704.

The rule in regard to proving the declarations or admissions of a party against him is, that "the whole of what he said at the same time, and relating to the same subject, must be given in evidence," because "the whole admission is to be taken together;" hence, to receive a part only would be to destroy the reason of the rule and violate the law.—1 Greenl. Ev. § 201, p. 282; *Wilson v. Calvert*, 8 Ala. 757.

3. The court below charged the jury that the sale by appellant, as administrator, of the articles exempt for the use of the family of his intestate, was void, and that such sale did not estop the widow from recovering in this action. We have already shown that a void sale or order of sale can not estop Mrs. Rackley, and that there is no estoppel of her by matters *in pais*. Then why is not the charge of the court free from error? The articles of property exempt from sale by an executor or administrator vests in each member of the family of the decedent, widow and children, absolutely.—Rev. Code, § 2061; subd. 6 of § 2062. The widow could not consent to a sale of the entire property, for the child was invested by law with an equal interest. The evidence of the witness Truett shows that the widow's distressed condition of mind was such that she was incapable of making a judicious or prudent contract, and perhaps incapable of making even a valid contract for any purpose, at the time he saw her. Her consent to the sale could not change the public policy of

Barwick v. Rackley et al.

the State as declared by the statutes above cited. The probate court, by her consent to the sale, acquired no authority whatever to order the sale of the exempt property, which it did, as shown by appellant, who swears that he sold under the order of the court. Consent can not confer jurisdiction, and hence the order of the court to sell, and the sale made under it of the exempt property, are, as the court instructed the jury to regard them, utterly void. *Carter v. Hinkle*, 13 Ala. 529.

The theory of the defense in the court below, and in this court, was, and is, that the sale of the exempt property was made by the appellant by virtue of an agreement previously entered into with the widow of his intestate. Was the sale in fact made under this authority and power, or not? It is clearly demonstrated that it was not. It was made under the order of the probate court. Obtaining the order of sale from the court, the report of the sale by appellant under oath to the court, and his own testimony on the trial, show that he sold under an order of the court. He says in his testimony, that "at the request and solicitation of adult plaintiff he sold at public outcry, under an order of the probate court, all the personal property of the deceased, except a few things which the widow had taken for her use." If the sale was made under the order of the court, then it can derive no support and no validity from any other power or authority, for "the law is unvarying and unbending, that no support is given to a sale by a power, when it is plain that the sale was made without reference to the power.—*Ala. Conf. M. E. Church South v. Price, ex'r*, 42 Ala., and authorities therein cited on page 50.

4. The fourth charge which appellant asked the court below to give to the jury was properly refused, for the reason that the same was abstract. There was evidence before the jury that appellant was the legal guardian of James R. Barwick, the minor plaintiff, but there was not one *centilla* of evidence that appellant, as such guardian, had ever charged himself with anything whatever belonging to his ward.

A charge is abstract when partly based on facts of which there is no evidence.—*Garrett v. Holloway & Malone*, 24 Ala. 376.

B. F. SAFFOLD, J.—The appellees sued the appellant for the conversion of certain property belonging to the estate of which he was the administrator, claiming that it was exempt from administration for their use as the family of the intestate. He defended on the ground that the sale of the articles was made at the request of the widow, and that he had accounted to her and the infant distributee for the proceeds. The judgment was for the plaintiffs.

The articles of personal property enumerated in section 2061 of Revised Code, are not subject to administration when the deceased leaves a widow, or a child or children under the age of twenty-one years, as was the case in this instance, but they belong to the family in common for their use and consumption. They are subject to division, however, if any member should leave the family.—Rev. Code, § 2062.

If the family should not need them, it would be highly proper for the administrator to take charge of them, and sell them for the use of those entitled to them. In such case he would be chargeable with their value as administrator, because as far as he is, or may be, concerned about them, they are the property of the estate. His accountability would be to those for whose use they were intended. If he made a disposition of them unauthorized by the parties, or by the circumstances, he would be liable for a conversion.

If Mrs. Rackley consented to the sale of the property in consideration of an agreement with the administrator that she should have one-half of the proceeds of the sale of the real and personal property of the estate, or of any greater interest than she was by law entitled to have, such an agreement was void, because beyond the power of the parties to make. There was no consent. But if the sale was made at her request, or by her permission, not based

on any invalid consideration, she is estopped by her consent.

There is no law prohibiting the widow, when she is the head of the family, from selling the exempted property. But if she is not the mother of the minor child or children, as in this case, and does not propose to keep the family together, she can only sell her own interest. In either case her right to sell may be exercised, whether the property has been set apart or not.

The guardian of a minor child would have no right to sell his proportion of the excepted property unless the child was withdrawn from the family, and if he did so, he would be liable as for a conversion.

That portion of the charge of the court which was excepted to was erroneous. The first three charges asked by the defendant ought to have been given, but the fourth was properly refused.

The objection to the introduction of the inventory and sale return of the defendant as administrator, was correctly overruled. They gave evidence touching many things necessary to be proved by the plaintiffs, such as the existence of the articles, the ownership of them, some indication of their value, the disposition made of them, and by whom, &c.—admissions of the defendant, no matter under what circumstances made.

The depositions of Martha Barwick and Susan Lisenby ought not to have been excluded. They did say they heard all the conversation at a particular time, though not all of the many conversations on the subject. It would be difficult for a witness to remember all that he had heard in any conversation. It was not an objection to its competency that this testimony tended to defeat the right of one of the plaintiffs to recover.

The judgment is reversed, and the cause remanded.

CITY OF SELMA *vs.* MULLEN.

[ASSUMPSIT AGAINST MUNICIPAL CORPORATION FOR SERVICES RENDERED, &C.,
UNDER PAROL CONTRACT.]

1. *Corporation; when may contract by parol.*—A corporation may make a legal contract by parol, unless the statute of incorporation or some by-law of the corporate body forbids it.
2. *Same; when assumpsit lies against.*—The corporation of a town or city is not exempt from this rule. And when this is the case, an action of assumpsit lies against such corporation upon an express or an implied promise.
3. *Same; what is competent evidence to show employment by.*—M., the city physician of an incorporated town, duly elected to his office by the corporate authorities, wishing to be paid *extra* compensation for attention to *small-pox cases*, went before the town council and requested to know what extra compensation would be allowed him, and was told in reply to his request, by one of the councilmen in hearing of all the others of the council then present in the council-room and engaged in their regular business, and without any objection from any councilman present, "*Doctor, go on with your small-pox cases, and we will do what is just and right; can't you take our faces for that?*" Held,—that this is competent evidence for M. in a suit against the corporation for extra compensation for services in such small-pox cases, in connection with other proof, that such services were performed and accepted by the corporation, when the action is "on account or verbal contract."
4. *Same; what such declaration estops city from doing.*—After such a declaration, the corporation is bound to pay what is just and right for the extra services thus rendered. And the corporation can not, by resolution of the council or by-law, fix the amount of extra compensation without the assent and concurrence of M., the physician.
5. *Same; receipts may be explained.*—If the council of the town or city fix this extra compensation at a certain sum, and this sum is paid to M., the receipts given for the sums thus paid do not estop him from showing, in a suit on his account for extra services, that he did not consent to receive the sums thus paid in full satisfaction of his claim.
6. *Municipal corporations; effect of civil war on franchises and powers of.* The late revolution, in this State, did not suspend the right to the exercise of the franchises of an incorporated town in this State, within the lines of the insurrectionary forces. Such incorporated town or city might still make legal contracts, upon which it would be bound, notwithstanding it was under the control of the insurgent power.
7. *Same; what contract approved by law of land and public policy.*—A contract by a city corporation with a physician, entered into during the late rebellion, to attend to indigent persons sick with the small-pox,

City of Selma v. Mullen.

whether belligerents or non-combatants, is not such a contract as is forbidden by the law of the land or the public policy. Attention to the sick is a duty of humanity, that no law of this State condemns.
[SAFFOLD, J., *not sitting*.]

APPEAL from Circuit Court of Shelby.

Tried before Hon. CHARLES PELHAM.

The facts are sufficiently stated in the opinion.

FELLOWS & JOHN, for appellant.

MORGAN & LAPSLEY, and HEFLIN & McCRAW, *contra*.

PETERS, J.—This is an action “on account or verbal contract,” for services rendered by appellee for the sick in said city of Selma, during the years 1865 and 1866. The suit was originally brought in the city court of Selma, but afterwards, by consent of parties, the trial of the case was changed to the circuit court of Shelby. The complaint contains two counts. They are as follows :

1. “The plaintiff claims of the defendant the sum of forty-six hundred dollars for work and labor done by the plaintiff for the defendant, at the request of said defendant, in the years 1864, 1865, and 1866.”

2. “And plaintiff claims of the defendant the further sum of ten thousand dollars for this, that on, to-wit, the 9th day of May, 1865, at the special instance and request of the mayor and council of the city of Selma, for and on behalf of the said defendant, the plaintiff, who was then and there the city physician of Selma, was employed by said mayor and council to bestow his professional service as a physician and surgeon upon the poor of the city, who were afflicted with a loathsome and contagious disease known as the small-pox, and the said mayor and city council promised and agreed with the said plaintiff to pay him what his services were worth, and plaintiff says that he did perform service in accordance with said employment, and bestowed his professional labors as a physician and surgeon upon a large number of the poor citizens of said city, all at the request of the defendant, to-wit, eight hundred

of said citizens, who were sick with small-pox, and plaintiff says his services were worth ten thousand dollars, which sum is now due, with interest thereon."

The record does not disclose upon what plea the parties went to trial in the court below, but there was a verdict for the plaintiff, Mullen, appellee in this court, for nineteen hundred and fifty-eight dollars and ninety-nine cents, (1,958.99,) and judgment was given accordingly. From this judgment the city of Selma appeals to this court.

There were numerous exceptions taken by the defendant in the court below, the appellant here, to the proceedings in that court, but they all, more or less, turn upon the same point; that is, the character of the contract between the plaintiff and the defendant upon which the action is founded.

The testimony shows that Selma is an incorporated city in this State, with power to make by-laws and conduct the affairs of an incorporated city, and that Dr. Mullen, the appellee in this court, was duly elected by the city authorities city physician for the municipal year, beginning on the first of May, 1865, and the year 1866. There was also proof tending to show that he was employed by the corporate authorities, at "extra compensation," to attend to certain "small-pox cases," during his terms of office, in the years above named, but it did not appear that there was any written or verbal order or resolution of the corporate authorities making this employment; but one of the councilmen, in the presence of the city council, convened for official business in the council chamber, told Dr. Mullen, in reply to his request to have his extra compensation fixed for services in "small-pox cases," "Go on, doctor, and attend to your small-pox cases, and we will do what is just and right; can't you take our faces for that?" This was said in the presence of the council, and there was no objection. Dr. Mullen then left, and "the council went on with its regular business." There was proof that the services were performed under this direction thus given, and what such services were worth; and, also, that the services so rendered were accepted by the corporation, and

a resolution passed to pay a certain sum per month for the same by the city. Under this resolution some payments were made and received, and receipts given for the same by Dr. Mullen. But the evidence was conflicting, whether the payments thus made were received by Dr. Mullen in full compensation for his services or not. There were numerous objections by the defendant to the evidence of the plaintiff, offered on the trial below. But they mostly turn upon the assumption that the evidence of employment, above detailed, was incompetent to show a liability on the part of the corporation, under the counts of the complaint above quoted. There were, also, several charges given by the court at the request of the plaintiff, which were objected to, upon the same grounds, by the defendant, and some asked in opposition, by the defendant, which were refused; also, some charges upon the illegality of the city government during the late rebellion.

A corporation is an artificial person—a creature of the sovereign legislative power. And there is no doubt such body corporate, within the compass of its powers, may enter into contracts, just as a natural person may make like contracts.—1 Black. Com. p. 467; 2 Kent's Com. 267, 270; Ang. & A. Corp. p. 1, §§ 1, 2, 6; *Dartmouth College v. Woodward*, 4 Wheat. 636, 518; *Bk. of Augusta v. Earle*, 13 Pet. 519; *Providence Bank v. Billings*, 4 Pet. 514; *Planters Bk. v. Andrews*, 8 Porter, 404; 1 Kyd, Corg. 13, *et seq.*; 2 Bac. Abr. Bouv. p. 437. It is quite clear that a corporation must act within the limits of its powers. The charter of its creation is the measure and warrant of its authority, though it is not confined alone to the express grant; but it may also extend to such as are incidental to these.—*Head & Amory v. The Providence Ins. Co.*, 2 Cr. 127; *Goszler v. Corporation of Georgetown*, 6 Wheat. 593, 597, 598; *Charles River Bridge v. Warrior Bridge*, 11 Pet. 420, 546; *People ex rel. Attorney-General v. Utica Ins. Co.*, 15 John. 358; 2 Bac. Abr. p. 445, *D. et seq.* Assumpsit lies against a corporation upon an express or implied promise.—*Bank of Columbus v. Patterson*, 7 Cr. 299; *Bank U. S. v. Dandridge*, 12 Wheat. 64; *Danforth v. Schorarie & Duanesburgh Turn-*

pike Road, 12 John. 227; *Montgomery County v. Barber*, 45 Ala. Rep. 237. There is no general law in this State which confines a town or city corporation to any particular mode of making contracts, or directs by whom such contracts shall be made. And unless the statute of incorporation prescribes the mode, and the persons by whom the contract is to be made, any legal mode is sufficient. A town incorporated under the Code must act through its intendant and councilmen, but in what manner this action is to be conducted is to be directed by its by-laws.—Rev. Code, §§ 1489, 1502. And a town incorporated by act of the general assembly, is a municipal and public corporation of which the court will take notice, and also of the law creating its franchises, (1 Greenl. Ev. ch. 2, § 6,) but not of its by-laws or ordinances. The learned counsel for the appellant has not called the attention of the court to any section of the statute incorporating the town of Selma which directs how the corporation should employ its city physician, nor has the court been able to discover that there is any special direction upon this subject. Nor has it been shown that there is any by-law of the city on the manner of employing the city physician. But it seems the usage was to elect him by the council, or by the mayor and intendant and council. Nor is it shown what duties were required of him. But it seems, that whilst the appellee acted as such city physician for the city of Selma, it was the custom of the corporation to pay for extra services for attending on "small-pox cases."

Dr. Mullen, the appellee, had been so paid for attention to "small-pox cases" on the request of the mayor. Dr. Morgan had also been liberally paid on like request. This seems to have been done in both these instances without any written order or resolution of the city council. But it also seems that Dr. Mullen felt himself entitled to some extra compensation for services for attention to "small-pox cases" during his term of office, and went before the council, when they had met for the transaction of the business of the corporation, and urged his title to such compensation. One of the members of the council said,

in presence of the others, who were then present engaged in their corporate capacity, in reply to the request of Dr. Mullen to have his extra compensation fixed, "Go on, Dr., with your small-pox cases, and we will do what is just and right; can't you take our faces for that?" No other councilman said anything. The council took no action, other than this declaration, on the matter at the time. Dr. Mullen left the council chamber, "and the council went on with their regular business." (The mayor's testimony.) Under this direction so given, Dr. Mullen attended to some eight hundred small-pox cases. And the proof showed that such cases were not too high at twenty-five dollars each. I think this was clearly an employment, a contract to pay what the services were worth. It was doubtless loosely made; but this is not a proper ground of complaint by the city authorities, because it was in their power to have made it differently. If the council sat silent and permitted one of their number to speak for them, and acquiesced in what was said, and allowed the services to be performed upon it, it must be taken as their mode of making the contract of employment, unless it is shown that there was some statute or by-law of the corporation, known to the party employed, which forbade it. The usage of the corporation may become the law of the corporation in such a matter, if there is no other law that forbids it. 4 Co. R. 78. After the contract of employment to attend to small-pox cases for extra compensation was entered into, no subsequent by-law could alter it or impair it, without the consent of both the parties to it. Such a by-law would be void for unconstitutionality. The power to make by-laws is derived from "the State," and the State could not confer a power it did not itself possess.—Const. U. S. Art. I, § 10, cl. 1; Pasch. Const. p. 153, 154.

What the services performed were worth, or whether they had been performed, or whether they had been paid for or otherwise adjusted, were questions left to the jury, and their verdict is final, and not subject to review in this court upon appeal.

In this view of the law, the charges given by the court,

and the refusal to charge as requested by the defendant, were correct.

The charges given at plaintiff's request express in substance the view of the law as set forth in the charge given by the court. It is unnecessary to notice these numerous charges refused. They were all based substantially upon the views of the law as set forth below, in the charge asked and refused by the court.

The court charged the jury, in substance, that "if they believed the city authorities employed the plaintiff to attend to their small-pox cases, and that he did attend to the small-pox cases, then the city of Selma is in law bound to pay him whatever the testimony satisfies the jury that such services were reasonably worth, unless there was an express contract, in which latter event that must control plaintiff's compensation." Defendant excepted to this charge.

Among other charges asked by defendant, and refused, was the following :

"If the jury believe from the testimony that Dr. Mullen was the city physician of the city of Selma in the years 1865 and 1866, he was bound by the duties of his office to attend to small-pox cases, and that by reason of his accepting said office he was bound to attend such small-pox cases at such extra compensation as the city authorities deemed proper ; and if the jury believe from the testimony that after he had so accepted the position of city physician, he applied to the city council or authorities to fix the amount of extra compensation, and the council, or some member thereof in the hearing of the others, requested the plaintiff to go on and attend to the small-pox cases, and the city authorities would compensate him liberally, that this did not constitute a contract between the city and Dr. Mullen, and would not authorize Mullen to repudiate his contract with the city made by his election and acceptance of the office of city physician."

The receipts given by Dr. Mullen for the amounts paid him as city physician for the city of Selma, and the resolution of the council, were not estoppels, unless it appeared

that Dr. Mullen so received and considered them. Receipts may be explained, and the resolution amounted to nothing without the concurrence of Dr. Mullen. These were questions for the jury, and not for the court.

The charter of the city of Selma was not suspended, repealed or revoked by the rebellion, and if its corporate officers were elected or appointed as required by the statute of incorporation, they could go on and discharge their duties under the laws of the State as before the insurrection. There is no pretence that they were not so elected. There was no proof of treason, on this trial, against the corporation, and it will not be presumed that because the city was within the jurisdiction of the insurrectionary authorities, the corporation was engaged in committing treason. And attention to the "sick," even of the enemy, is not a belligerent act. It is a duty of humanity, which is excepted from the catalogue of crimes arising out of acts in aid and comfort of the hostile power. *Shortridge v. Macon*, (North Carolina,) June, 1867, Chief Justice CHASE, *arguendo*.

The objections made to the testimony of the plaintiff are the same as those afterwards raised in the charges and excepted to, and the charges asked and refused, or they were such as occasioned no injury to the defendant.

The judgment of the court below is affirmed.

SAFFOLD, J., *not sitting*.

RIVERS vs. DURR.

[EJECTMENT FOR RECOVERY OF LAND.]

1. *Chancery ; jurisdiction of over infants*.—If a bill be filed relative to an infant's estate or person, the chancery court acquires jurisdiction, and the infant, whether plaintiff or defendant, immediately becomes a ward of the court.

2. *Same; when decrees of are binding on infants.*—Decrees made in suits by infants' plaintiffs, are as binding upon them as upon adults.
3. *Same; power of to change property of infants.*—Whether the chancery court has or has not jurisdiction to sell the real estate of tenants in common for division, lands so sold at the suit of an infant, when that is the only objection to the sale, may be referred to the power of the court to change the property for the benefit of the infant, when the infant seeks to recover the land from the purchaser by action of ejectment.

APPEAL from the Circuit Court of Montgomery.

Tried before Hon. JOHN ELLIOTT.

The appellant sued to recover from the appellee a lot of land in the city of Montgomery.

In 1858, she being then a minor, filed her bill by her next friend in the chancery court, alleging the following facts. Her father and mother, after their marriage, in pursuance of an ante-nuptial agreement between them, conveyed this property to a trustee for the sole, separate, and exclusive use and benefit of her mother, it being her's before the marriage. Her mother had died, leaving three children, including the complainant, her only heirs at law. The property could not be partitioned between them, and therefore a sale for the purpose of division was prayed. The trustee, and proper parties, were made parties defendant, and they admitted the allegations. The land was sold under the decree in the cause, and was bought by Edna Watkins, one of the children. From her the defendant derived title by purchase. Under the charge of the court the jury found a verdict for the defendant.

ELMORE & GUNTER, for appellant.—I. At the common law no court had the power to award a writ of partition between tenants in common and joint tenants against the will of any of the parties. This was remedied by statutes 31 Hen. 8, ch. 1, and 32 Hen. 8, ch. —; and the court of chancery having assumed jurisdiction of partition after that period, the first reported case being in 48 Eliz., took it as extended. But no statute ever gave the power to sell for partition, and it has never been assumed. Not a single word can be

found in the works upon equity jurisprudence showing that a sale can be made for partition, and all writers who have considered the subject admit that the inherent powers of the court do not extend to decreeing a sale. This is also evidenced by the fact, that perhaps in every State statutes have been passed conferring the power upon their courts to sell in particular cases to effectuate a partition.—8 Cow. 361; 1 Story's Eq. § 446, *et seq.*; *Deloney v. Walker*, 9 Port. 501; 2 Lead Cases in Eq. 640-48, and authorities there cited; 10 Paige, 470.

II. This deficiency in the powers of the chancery court has been remedied in this State by conferring upon the probate court authority to sell for partition, and the chancery court is yet without power in the premises.—Revised Code, § 3120; 2 Lead. Cases in Eq. 640-48; *Deloney et al. v. Walker*, 9 Port. 501; *Williamson v. Berry*, 8 How. 495, 581.

III. The chancery court has no inherent jurisdiction to sell legal real estate of infants for *any purpose*.—3 L. C. in Equity, 269; *Egee v. Countess of Shaftesbury*; *Williamson v. Berry*, 8 How. 555-56; Tyler on Infancy, 296, § 193, 298, 194 and 304, § 200; *Rogers v. Dill*, 6 Hill, 415; *Russel v. Russel*, 1 Molloy, 525; *Gaunstone v. Gaunt*, 1 Collyer, 577; *Wood v. Mather*, 38 Bart. 473; Ambler Rep. 419; Tif. on Trusts and Trustees, 641-2; 1 Spence's Eq. Ju. 613, note *i*; *Calvert v. Godfrey*, 6 Beavan, 97; *Pets v. Gardner*, 2 Y. & Coll. N. S. 312; MacPherson on Infants, 297, 301, 307, 311, 312.

IV. But the question in this case is whether or not the chancery court can order a sale of an *infant's* land for *partition*. It will be seen that the bill asking the sale is based wholly on the ground of the necessity of it for partition. There is no allegation that a sale would be beneficial to the infant. The decree for the sale shows that the whole object was to effect a partition.

If the court could not sell an adult's land for partition, how could it sell an infant's, as in the latter case there is no possibility of consent? The fact of infancy, is itself an

insuperable difficulty in the way of sustaining the decree of sale.

The appellee is able to cite a few cases in which courts have exercised the power or asserted the right to sell for partition; but, upon examination, it will be seen that the question of the jurisdiction was not raised, that the cases are ill considered and are not supported by any authority, and in some instances are not the decisions of the highest courts of the State.

But, on the other hand, it is conceded by all writers and adjudicated in all the highest courts of the country, that the court is without inherent power to sell for partition the lands even of adults, and cannot sell that of infants for any purpose.—See authorities, *supra*.

V. If the court had no jurisdiction to make the sale of the infant's land, the decree and sale under it are void, notwithstanding this is a collateral attack of the decree of a court of general jurisdiction.—*Lamar v. Comm'r's Court of Marshall County*, 21 Ala. 772; *Gunn v. Howell*, 27 Ala. 663; *Miller v. Jones*, 26 Ala. 247; 25 Ala. 408; *Wyatt's Adm'r v. Rambo*, 29 Ala. 510; 3 Lead. Cases in Equity, 269, 270; *Grignon's Lessee v. Astor*, 2 How. 319; *Rogers v. Dill*, 6 Hill, 415; 1 Smith's Lead. Cases, 847, (5 Am. edition,); *Hunt's Heirs v. Ellison's Heirs*, 32 Ala. pp. 200 and 209.

GOLDTHWAITE, RICE & SEMPLE, *contra*.

(No brief for appellee came to Reporter's hands.)

B. F. SAFFOLD, J.—The jurisdiction of the chancery court to sell land for division is not so much involved in this case as the question, whether the court, in the exercise of its guardianship over the person and property of minors, has authority to sell the real estate of the minor. Of this latter there can be no doubt.

In *Ex parte Philips*, 19 Vesey, 117, Lord Eldon said, "In the case of the infant it is settled, that as a trustee out of court cannot change the nature of the property, so the court, which is only a trustee, must act as the trustee out

of court; and finding that a change will be for the benefit of the infant, must so deal with it as not to affect the powers of the infant over the property, even during his infancy, when he has power over one species of property and not over the other." That is, if the money of an infant be laid out in land, and by law he may dispose of personal property before he becomes adult, his power of disposition during infancy is not to be prejudiced. He is bound by the exchange, but he may treat the land as personal property if he chooses.

If a bill be filed relative to an infant's estate or person, the court acquires jurisdiction, and the infant, whether plaintiff or defendant, and even during the life of its father, or of a testamentary guardian, immediately becomes a ward of the court.—*Eyre v. Countess of Shaftesbury*, Lead. Ca. in Eq. vol 2, part 2, p. 139. Decrees made in suits by infant plaintiffs are as binding upon them as upon adults. Lord Hardwicke observed that he knew of but one exception. In that case the infant was a defendant to a cross-bill, and both cases being heard at the same time, he had leave to show cause, when he came of age, against his own decree.—*Gregory v. Molesworth*, 3 Atkins, 626; 1 Dan. Chan. Prac. 96.

In this case, the sale from which the defendant derived his title, was made at the suit of the plaintiff. She claimed a right to what she asked, and those who alone could contest with her assented to it. The jurisdiction of the court attached, and we must presume that the change of property was ascertained to be for the interest of the minor.

The judgment is affirmed.

EX PARTE SELMA & GULF RAILROAD CO.

[APPLICATION FOR MANDAMUS.]

1. *Act to loan three per cent. fund, &c.; is still of force.*—The act of the general assembly of this State, entitled, “An act to *loan* and *appropriate* the three per cent. fund and its interest,” approved, February 18, 1860, is a constitutional law.—Pamph. Acts, 1859, 1860, p. 54, Act No. 68.
2. *Three per cent. fund; is a trust fund.*—The “three per cent. fund” does not belong to the State. It is given by the congress of the union to the State, in trust for the purposes named in the gift; that is, for the purpose of making “public roads, canals, and improving the navigation of rivers,” in this State.—Act of Congress, March 2, 1819; Clay’s Digest, pp. xxii, xlv.
3. *Same.*—The act of February 18, 1860, above referred to, grants a *loan* and *appropriation* of the sum of forty thousand dollars to the Selma & Gulf Railroad Company, and to which said company is entitled upon complying with the requirements of said act.
4. *Same; what does not forfeit right of company to apply for loan of.*—When it appears that any of the railroad companies, to which *loans* and *appropriations* of said “three per cent. fund” are granted by the second section of said act, applied for the same within six months after the passage of said act, and in the manner prescribed therein, and that such *loan* and *appropriation* was postponed by the governor, a subsequent application may be made in renewal and continuation of the first application, which was so postponed. Such postponement does not forfeit the right to the *loan* and *appropriation* granted under the act.
5. *Same; application for, to whom may be made.*—And an application so made in renewal and continuation of such first application, made within the six months after the passage of said act, and postponed, does not come too late, if made to the governor of this State, elected and inducted into office under the present constitution of this State.
6. *Same; action of governor in respect to; when will not be controlled by court.*—The duties devolved upon the governor by said act are to be performed by him, under the law, in his own way. The performance of his duties is not to be controlled by this court or any other, when he acts under authority of law. Of such things, he is the sole judge, in the executive branch of the State government.
7. *Same; warrant given in payment of loan of; when only treasurer can refuse payment of.*—Upon the issuance or drawing of the “warrants,” as authorized by said act, to the party entitled to the same, unless there is fraud, the warrants, so issued or drawn, give a right to the company in whose favor they are drawn, to the amounts therein named, upon the treasury of the State, which, upon proper application, the treasurer

Ex parte Selma & Gulf Railroad Company.

can not refuse to pay, unless there is a deficiency of funds in the treasury for that purpose. Such right will be enforced by *mandamus*.

At its February term, 1871, the city court of Montgomery overruled and refused the prayer of the Selma & Gulf Railroad Company for a *mandamus* to compel the treasurer of the State of Alabama to pay to petitioner a warrant, drawn in its favor by the auditor, for the sum of \$40,000, under an act entitled "An act to loan and appropriate the three per cent. fund and its interest," approved, February 18th, 1860, and the said petitioner excepted to the decision, took a bill of exceptions, &c., and now renews the application in this court.

The petition alleges the corporate existence of the petitioner, &c.; recites the act of February 18th, 1860, entitled "An act to loan and appropriate the three per cent. fund and its interest," and various other acts of the legislature in relation thereto. By section two of said act, which loans out the three per cent. fund, it is enacted, that "the sum of \$40,000 of the same fund (the three per cent. fund) be loaned to the Selma & Gulf Railroad Company." The third section provides that loans shall be for the term of five years, and the amount of interest, &c., on the loan, six per cent. The 9th section, after referring to the terms and conditions of the act of February 17th, 1854, provides that the companies to whom any of the three per cent. fund has been loaned, upon complying with the conditions, &c. prescribed by the act of February 17th, 1854, shall receive from the Governor a warrant for the proper amount on the comptroller, (now auditor,) who shall draw his warrant therefor on the treasurer, who shall pay the same "out of the monies in the treasury not otherwise appropriated," &c. The 18th section of the act provides, in effect, that on the failure of any of the companies to whom the three per cent. has been loaned, to apply for the same within six months, and comply with the requirements prescribed by the act, it shall not be entitled to the loan, but the same shall be divided *pro rata* among the other companies mentioned in the second section of the act, &c.

The 14th section of the act provides, in substance, that

Ex parte Selma & Gulf Railroad Company.

whenever there are not sufficient funds in the treasury, not otherwise appropriated, &c., to satisfy the loans and appropriations made by the act, the governor shall have power to postpone such loan and appropriations until the amount in the treasury, not required to meet other appropriations, shall be sufficient to pay the same.

The petition further states facts, which show that within six months after the passage of the act the petitioner applied for the loan, being prepared and offering to comply with all the requirements of the act and conditions precedent to receiving the loan, but A. B. Moore, the then governor, under the power vested in him by the act, postponed the payment of the loan.

In November, 1871, the petitioner made another application for the loan to Wm. H. Smith, then governor of Alabama, and "gave bond and mortgage, and security satisfactory to the governor," and obtained from him his warrant on the treasurer in favor of petitioner for said sum of \$40,000. The treasurer, on presentation of the warrant, declined to recognize its validity, and refused to pay the same, and informed petitioner that he would not pay said warrant, although he might have funds in the treasury, not otherwise appropriated, sufficient to pay the same.

The answer of the treasurer alleges, in substance, that the time during which any portion of the money loaned by this act could be paid, had long since expired, to-wit, on the 10th day of August, 1865, and that there was now no authority for paying the loan; that the postponement by Gov. Moore was not made in accordance with law, and did not give petitioner any right to apply for said loan now.

ALEXANDER WHITE, and E. W. PETTUS, *pro* motion.

ATTORNEY-GENERAL SANFORD, *contra*.

PETERS, J.—By an act of the congress of the United States, passed on March 2d, 1819, entitled "An act to enable the people of Alabama territory to form a constitution and State government, and admission of such State into the union on an equal footing with the original States," *for*

propositions were submitted to the convention to be called to form said constitution and State government, for their "free acceptance or rejection," and if accepted by the convention, to be obligatory on the United States. Each of these propositions were accepted. The third was in these words :

"That *five per cent.* of the net proceeds of lands lying within the said territory, and which shall be sold by congress, from and after the first day of September, in the year one thousand eight hundred and nineteen, after deducting all expenses incident to the same, shall be reserved for making public roads, canals, and improving the navigation of rivers, of which *three-fifths* shall be applied to those objects within said State, under the direction of the legislature thereof, and *two-fifths* to the making of a road or roads leading to said State, under the direction of congress."—Clay's Dig. pp. xxii, xxiii, xxiv; *ib.* p. xlii, *ordinance*; Code of Ala. pp. 51, 52, § 3; *ib.* p. 47, *ordinance*. The funds raised and paid to the State under this "proposition" have been called in our statute laws, "the three per cent. fund," and "the two per cent. fund." By further act of congress, approved September 4th, 1841, the two per cent. fund was relinquished by congress to the State, and accepted by the State, upon the terms proposed by the national government.—Pamphlet Acts, 1841, 1842, p. —. And up to January 1st, 1860, the State had received of the three per cent. fund the sum of eight hundred and fifty-eight thousand four hundred and ninety-eight dollars, (\$858,498.00,) principal and interest. And of this fund, so received, there then remained unappropriated the sum of one hundred and ninety-five thousand three hundred and sixty-two dollars and ninety-one cents, (\$195,362.91.)—Pamphlet Acts, 1854, 1860, Act No. 68, § 1, p. 54; Report of joint select committee to general assembly of Alabama, January 17th, 1860, *passim*. On the 18th day of February, 1860, after acting on the report above cited, a law was passed by the general assembly of this State, entitled "An act to loan and appropriate the three per cent. fund and its interest."—Pamph. Acts, 1859,

Ex parte Selma & Gulf Railroad Company.

1860, p. 54, No. 66. By this act this fund was *loaned* and *appropriated* as therein designated and prescribed. Omitting the enacting clause, I quote below the first and second sections of this law, of February 18th, 1860, as follows :

“SEC. 1. That the sum of eight hundred and fifty-eight thousand, four hundred and ninety-eight dollars is hereby declared to be the amount due as *principal* and *interest* from the State to the three per cent. fund, of which sum one hundred and ninety-five thousand, three hundred and sixty-three dollars is the balance due as a loan to the Tennessee and Coosa Railroad Company, under an act approved 17th February, 1854. Said loan is ratified as prescribed in said act, and the balance of said three per cent. fund, amounting to six hundred and sixty-three thousand, one hundred and thirty-five dollars, is *loaned* and *appropriated* as hereinafter enacted.”

“SEC. 2. That the sum of two hundred and eighteen thousand dollars of said fund be loaned to the North-east and South-west Alabama Railroad Company; that the sum of seventy-five thousand dollars of the same fund be loaned to the Willis Valley Railroad Company; that the sum of two hundred and twenty-five thousand dollars of the same fund be loaned to the Alabama and Tennessee Rivers Railroad Company; *that the sum of forty thousand dollars* of the same fund be loaned to the *Selma and Gulf Railroad Company*; that the sum of twenty-five thousand dollars of the same fund be loaned to the Cahaba, Warrior, and Greensboro Railroad Company; that the sum of fifty thousand dollars of the same fund be loaned to the Opelika and Oxford Railroad Company; and the sum of thirty thousand dollars of the same fund be loaned to the Montgomery and Eufaula Railroad Company, all on the same terms and with the stipulation and conditions hereinafter prescribed.”—Pamph. Acts 1859–60, No 68, p. 54.

The language of this statute is too plain for doubt or misconstruction. The intent is strongly and emphatically expressed, and the law actually “*loans and appropriates*” the fund therein named to the parties mentioned. This is a trust fund, and the State is the trustee, and it is bound

Ex parte Selma & Gulf Railroad Company.

in good faith to pay the interest on it, or to loan it out, or invest it, as the terms of the gift require. The liability to pay interest is acknowledged in the words which describe the debt, as is shown in the first section of the act above quoted. It is also acknowledged by the general assembly in the act approved on 2d February, 1839, in making an appropriation out of the "interest of the three per cent. fund" for the improvement of Elk river, in this State.—Pamph. Acts 1839, p. —. The loans thus granted were to continue for five years, bearing interest at the rate of six per cent. per annum, payable semi-annually at the treasury of the State. The parties accepting the same, before the money could be paid over to them, were required to execute a bond to the State in double the amount of the sum to be received, in each case, conditioned as required by the act, and to be secured, to the satisfaction of the governor, by mortgage or deed of trust, and such other security as the governor in his discretion shall require, if in any case he shall deem other security necessary and proper.—Pamph. Acts 1859–60, No. 68, §§ 3, 4, p. 54.

The ninth section of said last named statute also enacts, "that when any of the railroad companies named in this act shall comply with the terms and conditions of this act, or the act of February 17th, 1854, relating to said companies respectively, and made conditions precedent to the loan or payment of money, as the case may be, the governor of the State shall draw his warrant in favor of the proper party for the amount, on the comptroller, who shall draw his warrant for the same upon the treasurer of the State, which warrant shall be paid by the treasurer out of the moneys in the treasury not otherwise appropriated, and charge to account of the three per cent. fund."—Pamph. Acts 1859–60, No. 68, § 9, p. 54. There are two other sections of this law proper to be noticed in this discussion. The first of these is section fourteen, and I cite so much of it as applies to this case :

"In case it shall appear that the funds in the treasury, not otherwise appropriated and required to meet other appropriations, shall be insufficient to satisfy the loans and

appropriations authorized by this act, at the time the same shall be applied for, the governor shall have power to direct the amount in the treasury not required to meet other appropriations, to be distributed *pro rata* among such of said companies as shall apply for the loans and appropriations authorized by this act, and the *balance* of such loans and appropriations shall be postponed *until* the amount in the treasury not required to meet other appropriations shall be sufficient to satisfy the same."

And the other section referred to is in these words :

"That if any of the companies mentioned in the second section of this act shall fail for *six months* from the passage of this act, to apply for the loan therein prescribed, and to comply with the requirements prescribed in this act, the amount so proposed to be loaned such company shall be loaned *pro rata* to the other companies mentioned in the second section of this act, or to such of them as may apply therefor, upon the same terms and conditions as are prescribed in the third and fourth sections of this act; *Provided*, said companies shall apply for the same within eight months from the passage of this act."—Pamph. Acts 1859–60, p. 54, No. 68, §§ 14, 18.

From these sections it very clearly appears that the governor was clothed with power to postpone these loans, or any one of them, if there were not funds unappropriated to pay them when applied for, and that the applications for these loans were required to be made within six months after the 18th day of February, 1860, the date of the passage of the act. This seems to me the most rational construction of the language of the statute. The legislature doubtless intended to close the operations under this law in five years and six months with the companies which did not fail to avail themselves of the benefits of the loans, or within five years and eight months after the date of the act, as to those loans that were permitted to lapse and were not taken by the companies named in the first instance. Two months longer were allowed to dispose of such loans as failed to be appropriated under the first offer. But the governor was permitted to prolong this pe-

ried by postponing such loans as there might happen to be no funds unappropriated in the treasury to meet, when applied for. In this way the operation of the law might be extended until funds to meet the loan proposed accumulated in the treasury. This statute has never been repealed, suspended or modified. Its purpose has not been accomplished. It can not be repealed by *non-user*. It must therefore still be in force.—*White v. Boot*, 2 T. R. 375. Very evidently, its purpose, so far as the applicant in this case is concerned, is not accomplished. That it has been postponed, is not the applicant's fault. This is the view, doubtless, that his excellency, the late governor of this State, took of the enactment. I think it the correct one. If the law was in force when the governor acted, clearly he was authorized to perform the duty it devolved upon him. The petitioner had not forfeited its rights or failed to comply with the requisitions of the law within the period prescribed and in the manner prescribed. The postponement of the loan in the first instance, the intervention of the rebellion and overthrow of the lawful government of the State, and want of funds in the treasury, necessarily extended the period in which it was possible to complete the arrangements for the loan granted by the act. This was the question left to the governor, whether the time for the loan had expired or not. He has decided that it had not, and that there were sufficient funds in the treasury subject to the loan. It is not for this court, or any other, to review his acts. In such a case, his jurisdiction is paramount to that of this tribunal. He was charged by law with a duty, and he has performed it. This court, it seems to me, can only interfere when the chief executive acts without sanction of law. In this case there can be no question as to the constitutional validity of the law. It is merely an act regulating a trust fund, over which the general assembly had undoubted control. Act of Congress, March 2, 1819, *supra*. The law had not failed either by *non-user*, express limitation, or by limitation reasonably to be inferred from its purpose or its language. The funds "loaned and appropriated" are not the

property of the State, or such as the State may legally confiscate or divert to its own use. They are wholly trust funds, and should be dealt with as such, loaned out and increased as much as possible, until applied to the very important uses for which they were given by the government of the Union to the State; that is, to the aid of such works of internal improvement as are named in the gift. Act of Congress, March 2, 1819, *supra*.

Here the application for *mandamus* shows that the petitioner is the railroad company to which the grant of the loan was made, out of certain trust funds called the "three per cent. fund," to the amount of forty thousand dollars; that this loan was accepted and applied for by the company, in the proper way, and within the proper time; that the same was postponed by the governor, under authority given him by the act. In such a case, this court will take notice of the intervention of the late war and the overthrow of the lawful government of the State during the late rebellion, and that the loan was necessarily postponed during this period; and that the application in renewal of the former application made at first, was made in reasonable time after the restoration of the rightful government of the State. The petitioner also shows, that upon the renewal of the application for the benefit of the loan granted the petitioner, the governor drew his warrant on the proper officer for the amount of money loaned of the three per cent. fund; that this officer was the auditor of the State, and that the auditor drew his warrant, in conformity with the warrant of the governor and the requisitions of the law, upon the treasurer of the State for the amount loaned, and this warrant of the auditor the treasurer refused to pay. From what has already been shown, I think in this the treasurer misapprehends the law, though at the same time his vigilance and caution are to be most highly commended.

Let a rule *nisi* issue as asked by petitioner, returnable *instantanter* into this court, during the present term, requiring, &c.

MOODY vs. ROBERTSON.

[ACTION TO RECOVER MONEY PAID BY MISTAKE—SET-OFF.]

1. *Set off.*—Where a person conveyed land to another in consideration of the payment by the latter of his indebtedness to a third person, and it was afterwards ascertained that the debt had been previously paid, in a suit by the party making the payment to recover it as money paid by mistake, the defendant may make available a set-off against the party for whose benefit it was paid, though not a party to the record.
2. *Money paid by mistake, suit to recover; by whom may be maintained.*—A suit to recover money paid by mistake may be instituted in the name of the party really interested.

APPEAL from Circuit Court of Tuskaloosa.

Tried before Hon. W. S. MUDD.

This cause of action arose in the following manner: John Robertson conveyed to his son, John T. Robertson, a tract of land in consideration of the payment by the latter of several judgments against him. Among these was one owned by Mrs. Eliza Cunningham. It had been previously paid by a co-obligor, but this was forgotten. Moody, the attorney for Mrs. Cunningham, received both payments, and when he discovered the mistake he reclaimed the last payment, but held it as a partial satisfaction of a larger judgment recovered by himself against John Robertson. In this state of the case, John T. Robertson sued Moody for the amount so retained. The latter pleaded the general issue, payment, set-off, and a special plea stating the facts as above. This last plea was verified.

The court charged, in substance, that the plaintiff was entitled to recover, unless the conveyance made by John Robertson had the effect of transferring to him the demand; and that it did not have such an effect if the money was paid by mistake.

There was a verdict and judgment for plaintiff.

Defendant appeals, and here assigns as error the charge of the court.

WASHINGTON MOODY, *per se.*

SOMERVILLE & McEACHIN, *contra.*—The only point that is presented in the bill of exceptions is, whether this set-off is good in a court of law?

The statute authorizes only such debts and demands to be set-off as are "mutual."—Rev. Code, § 2642. It is obvious to the legal mind, that there is no such mutuality here as is contemplated by the statute. The defendant owes the plaintiff, and John Robertson, a third party, owes the defendant. The latter debt is *res inter alios acta*; and though there is a remote equitable connection between the two transactions, the debts are in different rights and not mutual.

The money sued for is the plaintiff's; the claim sought to be set-off is the debt of plaintiff's father. The party suing is not, as to the latter claim, defendant's debtor. Waterman on Set-off, p. 45, § 40; p. 26, § 22.

"The subject of a set-off," says the same authority, "is a cross debt or claim on which a separate action might be sustained, due to the party defendant from the party plaintiff."—*Ib.* p. 3. And "it must be a legal, not an equitable demand."—*Ib.* p. 29 (note), p. 26, § 22, (*supra.*)

The reasoning of the learned judge of the lower court, as stated in the bill of exceptions, is both logical and incontrovertibly correct—that the action against defendant in plaintiff's favor, would lie "unless the deed from John Robertson and wife to the plaintiff had the effect of transferring the claim sued on to said John Robertson, and the deed did not in law have that effect, if the money was paid to and received by defendant by mistake, and the deed was executed by John Robertson under the mistaken belief that the money was due on Mrs. Harts' (the Cunningham) judgment at the time it was paid."

The following principle, enunciated in Waterman on Set-off, p. 88, § 72, should put the point involved here at

Moody v. Robertson.

rest. "It seems," he says, "almost unnecessary to state that a debt of the plaintiff to a third person, though connected with the subject of the action, cannot be set-off." The most that can be alleged, with any show of plausibility, by defendant, is that the collection of this money sued for, would in equity create a debt from the plaintiff to the father, John Robertson, and he anticipates this peculiar state of the case in seeking to establish his right of retainer.

It seems plain, that if the defendant has any remedy, it is not in this forum, but in another which possesses a broader power to correct the inequalities and insufficiencies of the law.

B. F. SAFFOLD, J.—The plaintiff is not entitled to recover if the defendant's judgment against John Robertson may be used as a set-off. It may be so used if the suit could have been instituted in the name of the said Robertson. The common law permits, and section 2523 of the Revised Code requires, a suit founded upon an implied contract for the payment of money to be prosecuted in the name of the party to be benefited.—1 Chit. Plead. 4, 100. A suit for the recovery of money paid by mistake, is based upon such an implied undertaking. As John Robertson was the party really interested, the defendant's judgment against him was available as a set-off, though he was not a party to the record.—*Bowen v. Snell*, 9 Ala. 481.

The charge was erroneous because the right of action accrued only on account of the payment by mistake.

The judgment is reversed and the cause remanded.

FIRST NATIONAL BANK OF SELMA *vs.* COLBY.

[ACTION AGAINST NATIONAL BANK ON CERTIFICATE OF DEPOSIT, COMMENCED BY ATTACHMENT.]

1. *National banks established by "currency act," how subject to be sued.*
The national banks established under the act of the congress of the United States called the "currency act," approved June 3, 1864, may be sued by a creditor of such bank in a State court by attachment. Stat. at Large, U. S., 1863, 1864, p. 99.
2. *Same; how such suits must be conducted.*—When such suits are so instituted in the courts of this State they are to be conducted and governed by the laws of this State, applicable to attachment suits against natural persons.
3. *National bank, attachment against; for what cause will not be dissolved, &c.*—Such attachment will not be dissolved, dismissed or abated, or the levy quashed, because the bank had committed an act of insolvency before the institution of the suit, and its charter had afterwards been dissolved and its franchises forfeited, by decree of the United States district court, and a receiver had been properly appointed to take charge of the assets of said bank, under said act of congress.
4. *Charge to jury; what not erroneous as to recovery against national bank.*
If the proof on the trial of such a cause shows that the plaintiff had a proper claim against the bank for a certain sum of money deposited with the bank by the plaintiff, and the bank on the trial interposes no plea in defense of the action, it is not error in the court to instruct the jury, that if they believe the proof, they must find for the plaintiff to the amount of the claim he has proved, and interest.

APPEAL from the Circuit Court of Dallas.

Tried before Hon. B. L. WHELAN.

The facts are stated in the opinion.

J. C. COMPTON, and CHILTON & THORINGTON, for appellant.
Does the process of attachment lie against this bank under the circumstances of this case? That is the question to be first settled.

We say it does not lie for three reasons: 1st. The proceeding by attachment is statutory, is in derogation of the common law, and there is no law of Congress or of the

State giving such a remedy against a national bank. Drake on Attach. § 4, p. 7.

It is neither, strictly speaking, a foreign or domestic corporation as contemplated by our statutes, but *sui generis*, and subject to such liabilities and remedies as are provided by the law of its organization.

2. In the second place, no attachment could properly have issued on the 17th day of April, 1867, because the bank, to speak metaphorically, *died the day before*. Its doors were closed, its business forever suspended, its president had absconded, and its assets taken possession of by the government of the United States, all before the attachment issued. There could have been no more unequivocal acts of a surrender of its corporate franchise than was furnished by this bank before the suing out of this attachment. In such case it can not be sued at law. The remedy, ordinarily, is in chancery to husband its assets, that they may be administered as a common fund for the payment of its debts, or as in this case to be summarily administered by the treasury department of the United States in accordance with the law of its creation.—See, as to the right of plaintiff below to sue a dead corporation, *Paschall v. Witsett*, 11 Ala. R.; *Mumma v. The Potomac Company*, 8 Peters, 281.

3. In the third place, no attachment could properly have issued after these acts of utter insolvency on the part of the bank, and the seizure of it by Gen. Swayne, by reason of the 52d section of the act of congress, under which the bank was organized.—13 Statute at Large, 115. That section, taken in connection with section 50, shows conclusively the object and spirit of the law, and that to allow any creditor of the bank, after it was put in liquidation, or after it had “committed an act of insolvency,” to acquire a lien by legal proceedings so as to collect his debt in full, leaving even the bill holders and the government, it may be, unprovided for, would be to strike down the act which prescribes specific appropriations of the assets, which establishes equality in the distribution of the entire proceeds, after paying the bill holders in full, and which for-

bids all assignments or transfers of its effects, or payment of monies after such act of insolvency.—See § 52. Surely the law will not do, (give a preference to one of a class whom it declares shall share rateably,) and sanction or create a transfer or assignment to that end, which it expressly declares shall not be made.—See an able opinion, directly in point, in *Venango National Bank v. Taylor*, 56 Penn. 14, 17.

4. Another reason may be stated: There was nothing to levy upon—nothing that could be levied on. The assets were in the hands of Gen. Swayne. His acts were valid. See Ordinance No. 15 of Convention, 1867; Acts of 1868, p. 167. The funds were as if in chancery, and not subject to be seized by the sheriff.—*McLemore v. Benbow*, 19 Ala. p. 76; *Read v. Sprague*, 31 Ala. 104-5-6.

Suppose the sheriff had attempted to levy on the safe in the vault containing all the assets of the bank. This being in the possession of the secretary of the treasury, through his constituted agent, would have been resisted—must the sheriff summon his *posse* and make war upon the United States forces? Would the law compel, nay, would it for a moment tolerate such a proceeding? Surely not. And why? Simply because the legally constituted authorities had possession of the assets, and the State courts, then doing business by the sufferance of the power which held the assets, had no right or jurisdiction to interfere. If, then, the personal property of the bank could not have been levied on, how could the sheriff levy on the land? The one, as much as the other, was in the custody of Gen. Swayne for the government.

ALEXANDER WHITE, *contra*—Argued at length, that under the act of congress, neither the contingency had happened which authorized the appointment of a receiver, nor had the facts been brought to the notice of the appointing power in such a manner, as, under the laws incorporating the national bank, would give the power to appoint a receiver; and further, that admitting the happening of the contingency, and its being properly brought to the notice

of the appointing power, still the power to appoint a receiver had not been followed as prescribed by law, and the appointment was illegal, and that the judgment of the United States district court was void on its face, &c. As this view was not considered in the opinion, it is unnecessary to give the argument more fully.

Mr. WHITE further argued as follows :

By section 57, the bank was liable to be sued in the State courts. Jurisdiction of a corporation, in Alabama, which owed to her laws the exercise of all its corporate functions, without which it could not have made a contract or enforced a right or redressed a wrong, was necessarily implied in the local life of the corporation, but it was not left to intendment or implication, but by the express terms of the organic law of its creation it is liable to "suits, actions and proceedings, &c., in any State, county or municipal court where such bank is located."

There is no restriction as to the kind of suits or the manner of suing, and every remedy and process known to to the courts in which suits may be brought is given as completely, more so, than if each had been enumerated in the acts of congress. For by its unqualified and general terms it embraces suits and remedies which thereafter should be originated in the State where located, as well as those then in being. And it is further implied that such suits, when brought in a local court, shall have the same force and effect they would have against any other person in those courts. The jurisdiction is given without qualification in the enacting grant, and must carry with it all the incidents of that jurisdiction, and the court itself upon which the jurisdiction is conferred, must of necessity regulate and control and adjudicate upon, the rights and remedies of parties litigant in that court. The fact of jurisdiction once properly in exercise, subordinates both subject matter and parties to the orders and judgments and decrees of the court.

It cannot be conceived that a court could discriminate between parties who stood "*in equali juri*" before it.

The attachment must have the same effect in this case as in others like it against any citizen of Alabama.

By express statutory provision, corporations are liable to attachments "in the same manner as if they were natural persons."—Revised Code, § 2942.

This was the law of Alabama at the time of the organization of the First National Bank of Selma, and it was accepted by it as one of the terms of the compact between it and the State in which it was domiciled.

The interpretation, within the jurisdiction of a State, of a local law (or statute) becomes a part of that law as much as if incorporated in it by an act of the legislature.—*Christy v. Pridgeon*, 4 Wallace, 196, 203; *Shelby v. Guy*, 11 Wheat, 362; *Teague v. Eying*, 24 How. 266.

The lien of an attachment is inchoate, dependent upon the party getting a judgment, and when he has obtained his judgment it is then consummated, and he has then a right to satisfaction out of the particular thing levied upon under the attachment.—*Hall v. Cummings*, 3 A. R. 398.

From the time of the levy of the attachment the property was in the custody of the law, and was not subject to levy under any other process.—*Runsdown v. Wilburne*, 6 A. R. 46; *Hagan v. Louis*, 10 Peters, 400; *Pond v. Griffin*, 1 A. R. 678; *Taylor and others v. Carryl*, 20 How. 598; *Case of Oliver Jordan*, 2 Cur. 414.

These were cases of personal property in which replevy bonds had been executed and the property returned to the defendant, but it is obvious that the principle applies with stronger force to lands, which are incapable of replevy and are therefore constructively in the custody of the sheriff till discharged by due course of law.

Where a court has jurisdiction, it has a right to decide any question which occurs in the cause, and when the jurisdiction of the court and the right of the plaintiff to prosecute his suit has once attached, that right cannot be arrested or taken away by proceedings in another suit. *Taylor and others v. Carryl*, 20 How. 596-7; *Peck v. Jenniss*, 7 *ib.* 612.

When concurrent jurisdiction may be exercised by the

federal and State authorities, the court which first takes jurisdiction can be interfered with by no other court, State or federal. It is a subversion of judicial power to take a case from a court having jurisdiction before its final decision is given.—*Ex parte Robinson*, 6 McLean, 355 ; *Ex parte Dorr*, 3 How. 103 ; *Taylor v. Carryl*, 20 How. 583 ; *Shelby v. Bacon*, 10 How. 56 ; *Smith v. McIver*, 9 Wheaton, 532 ; *Holmes v. Remsen*, 20 John. 229 ; *Merrell v. Lake*, 16 Ohio, 373 ; *Payne v. Dowd*, 4 East. 523 ; *Pulliam v. Osborne*, 17 How. 471.

Every country has the right of regulating the transfer of all personal property within its territory.

A State has perfect jurisdiction over all property, personal as well as real, within its territorial limits.—*Green v. Van Buskirk*, 5 Wallace, 312, 313 ; Story on Conflict of Laws, § 390.

The bank is a corporation chartered under an act of congress. It is the law of its organization, and bestows upon it certain qualities of being ; it goes no further. With no more than the attributes conferred by the act of congress, it has no faculty, no capacity of an acting, living thing.

It is an organism capable of life, a body without spirit, a machine without motion, and it is only when it is vitalized by the laws of the State where it locates, as with a coal from the altar, that it has within it the spirit of life.

Without these it cannot buy and hold as owner the house in which it does business, the land whereon it stands, the books in which its records are kept, the paper on which it writes its bills, the counter on which it receives and pays. It can not engage an officer, it can not discount a bill, it can not loan a dollar. It can not acquire a right, it can neither impose or incur an obligation. It can do nothing. It can not claim and assert its right to its franchise but by virtue of the laws of the State of which it is an inhabitant. It is an inert, lifeless thing until the laws of the State breathe into it life.

What is true of natural persons under the law, is also true of artificial persons, so far as their capacities extend.

When the bank became a person in Alabama, in being cherished and sustained by her laws, it became subject to those laws, and the condition of being sued, involved any form of suit and the incidents to those forms which were recognized by the courts of the State. It was not necessary that the act of congress should make this liability by express enactment. It would have existed without it. But when it is given, and given in general and unqualified terms, it implies all that the law confers in any suit brought.

This is the irresistible sequence of the liability imposed on the corporation, and the correlative right conferred on the creditor by the general and unconditional language of the act of congress, and when the right to sue is given, the right to prosecute to judgment in the ordinary modes must continue, unless there is some express prohibitory provision in the law itself.

Any privileges which exempts a corporation from the burthens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist.—*Prov. Bank v. Billings & Pittman*, 4 Pet. 514.

Even the bankrupt law, which, by express purpose and enactment, (when it may be said that the chief object of the law is to marshal all the property of the bankrupt for the benefit of all the creditors,) has the effect to stay proceedings or suits against the bankrupt in other courts only by force of positive provision, and that after it has been judicially ascertained that the party is a bankrupt.

By section 14, it is provided that all property of the bankrupt shall pass to the assignee, and attachments taken out within four months before the commencement of the proceedings in bankruptcy shall be dissolved.—*Ib.* 484.

This is positive enactment, and sustains the proposition that it requires positive prohibition by law to arrest proceedings rightfully instituted in a court having jurisdiction of the subject matter and the parties.

When a suit is begun and the defendant is in court, he must plead, answer or demur.

Then the test is, whether the matter set up in bar to the

prosecution of this suit is good as a demurrer, or plea. Is it in law or in fact, an answer to the complaint which will preclude the plaintiff from the further prosecution of his suit? What is it? It is that the defendant had committed "an act of insolvency." If this is a good plea, then every act of insolvency by a bank would be a good plea to any and every suit brought by its creditors against it. A refusal to redeem its circulation would be an act of insolvency. To-day, for the purpose of defeating suits against it by its creditors, it refuses to redeem its circulation; and to-morrow it resumes and goes on with its business as usual.

It will not do to say that it could not do this under the act, because the prohibition of the act extends only to a refusal ascertained, and evidenced in a certain way, and there are many other acts of insolvency to which it might resort as a mere subterfuge to delay or avoid suits by its creditors, which it would be an intolerable perversion to construe into a defence which should defeat its creditors or arrest the action of competent courts having jurisdiction.

There is only one other mode by which the action of a court of competent jurisdiction can be arrested before final judgment in due course of law, and that is where it is expressly enacted by law that in certain contingencies the proceedings in that court may be stayed and another court shall take jurisdiction of the subject matter of the controversy; but this must be done by judicial action, by the solemn judgment of a court, passing upon and adjudicating the state of facts which authorizes its action, and also decreeing that action.

PETERS, J.—On the 17th day of April, in the year 1867, the appellee, Colby, commenced an action at law by attachment against the First National Bank of Selma, for the sum of forty-eight hundred dollars. This attachment was regularly issued from the circuit court of Dallas county, in this State, and regularly executed by a levy on lands belonging to said bank, on the day of its issuance. The

bill of exceptions taken at the trial shows, that said bank ceased to do business on the 16th day of April, 1867, and had, on the 15th day of the same month, refused and failed to pay a draft of the United States for seventy-five thousand dollars. It further appears, that the president of said bank had absconded on the 17th day of April, 1867, and on that day said corporation's house of business and its assets were taken possession of by General Swayne, then commanding the Federal forces in this State, under instructions of the secretary of the treasury of the United States, and upon examination the cash account of said bank was found deficient in the sum of about two hundred thousand dollars. It was also shown that said bank was chartered on the 24th day of August, 1865, under authority of an act of the congress of the United States, entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." This act was approved June 3, 1864. After the levy of said attachment, viz: on the 1st day of June, in the year 1867, by decree of the district court of the United States for the middle district of Alabama, "all the rights, privileges and franchises of said association derived from the act of congress" were "forfeited," and said association, called the First National bank at Selma, was adjudged to be "dissolved." The record of the proceedings in said district court declaring the forfeiture and dissolution of said charter thereof were given in evidence to the jury on said trial. It was likewise shown that Cornelius Cadle, jr., had been regularly appointed receiver for said association as required by law, on the 3d day of June, 1867. The plaintiff also proved by his certificate of deposit the amount of his deposit in said bank to be the sum for which the attachment had been sued out; that is, forty-eight hundred dollars. This was the substance of all the evidence offered on the trial.

On this evidence, said Cadle, as said receiver, moved the court to dissolve said attachment, and also to quash and discharge the levy of the same on the property of said bank. These motions the court refused; and said Cadle,

as such receiver as aforesaid, excepted to the ruling of the court thereon. And thereupon the court charged the jury, that if they believed the evidence, they must find for the plaintiff "the amount of the certificate and interest." This charge was excepted to by said receiver. Cadle, as receiver as aforesaid, then asked the court to charge the converse of this proposition; that is, "if the jury believed all the evidence offered in this cause, they must find for the defendant. This charge the court refused, and the receiver, Cadle, excepted as before. There was a verdict and judgment for the plaintiff for \$5,632 33 and costs, and a *venditioni exponas* was ordered to issue to the sheriff to sell the property levied on.

I have looked into the act of congress under which the "First National Bank at Selma" was incorporated, and I have not been able to find any express authority there given which would justify a court of law, in which there was a litigation regularly instituted and pending, to dissolve or dismiss an attachment regularly and properly issued and levied on the property of that association, or to discharge the levy so made. Under the laws of this State, such motions do not affect the merits of the suit. They are, then, not matters of right, but only of discretion in the court. Such discretion is not a matter of error on appeal to this court.—*Gill v. Downs*, 26 Ala. Rep. 670; *Ex parte Putnam*, 20 Ala. 592. Under the provisions of the act of congress, the bank has power to "make contracts, sue and be sued, complain and defend in *any court* of law and equity, as fully as natural persons."—U. S. Stat. at Large 1863-64, p. 99; 101, § 8. Then it occupies, so far as these rights are concerned, simply the condition of a citizen. And it is entitled to the same indulgences and rights that a citizen may claim, and no more. If the suit is instituted in a State court, as it clearly may be, (8 Wall. 498,) then the law applicable to the conduct of such suits is applicable to the bank, subject, however, to such modifications as the law of congress may impose.

But the "national currency act," under which the bank at Selma was brought into existence, does not interfere, so

far as I am able to see, in any way with the suit in the State court. Of course, an act of congress made in pursuance of the constitution of the United States, is a part of the supreme law of the land, and a State law must yield to it.—Con. U. S. Art. VI, § 2; *Ableman v. Booth*, 21 How. 517, 520. But as the bank may sue and be sued as a natural person, in this State, it may be sued by attachment; because it stands in no better condition than a natural person, and a natural person, in this State, may be sued by attachment.—Rev. Code, §§ 2928–30, 2942. The insolvency of the bank does not dissolve the liability to be sued by attachment. The act does not say so. And it is not to be presumed that congress would interfere with a right so important to the citizen of the State without an express declaration to that effect. It is not a right to be postponed or defeated by a questionable deduction. If it may be interfered with to any extent, in the end it might be paralyzed and destroyed.—*Field v. Close*, 15 Mich. Then the conduct of the suit against the bank is to be judged and determined by our own law in reference to attachments. This does not interfere with or settle the effect or right of the lien under the levy of the attachment. That is not a question that can be raised in this suit in its present shape. No doubt that question is under the control of a jurisdiction where it will be properly determined. Under the law of this State, when an attachment is once properly issued against a corporation, it will not be abated or dismissed because the corporation had, before the issuance of the process, committed an act of insolvency, or because its assets had been placed in the custody of a receiver. The statute of this State governing such suits is as follows: “If the *defendant appear and plead*, the cause proceeds as in suits commenced in the ordinary mode. If he make no defense, the plaintiff may at the trial term take judgment final by *nil dicit*, or default, or execute a writ of inquiry of damages, as may be necessary.—Rev. Code, §§ 3000, 2942. The act of insolvency does not dissolve the liability to be sued, nor the liability to be sued by attachment. The act of congress does not

so declare, nor is it necessary for the purposes of that statute so to infer it. By the practice of our courts, attachments are only abatable when they have been issued without affidavit or without bond, as required by law. Rev. Code, § 2989; 19 Ala. 32. These being the only causes enumerated, others are excluded by their omission. And the plea in abatement, as all others, must be made by "the defendant," and not by a stranger. This is the language of the statute above quoted.—Rev. Code, § 3000; *Kirkman & Rosser vs. Patton*, 19 Ala. 32. And matter of abatement can not be given in evidence on an issue upon the merits, a default, or a failure to plead.

No doubt the government could send one of its military officers to seize upon its own funds deposited in a bank or elsewhere, when they can be legally reached. But the officer thus sent could not go farther and seize the property of the bank also. His possession as such officer in the latter case is not the custody of the law which courts of merely legal jurisdiction will respect, but the custody of the sword, which courts are not constituted to resist. This latter custody does not forbid the levy of a proper attachment legally issued. The funds of the United States deposited in the bank were not entitled to any lien on the assets of the bank, until, at least, the assets had passed into the custody of a receiver, if even then. The government had power to secure itself against such loss of its deposits by the security required to be taken in another way. The lien on the assets seems to be intended for the security of the note-holders of the bank, and not for the deposits.—Act of Congress, *supra*, § 45. It is possible that the lien of the attachment must give way to the equities arising under certain sections of the above recited act of congress, and to the necessities of an administration and distribution of the assets of the association by the receiver; but this question does not arise in this case, and it is not necessary to be decided.—Act Cong. *supra*, §§ 47, 50, 52. Claims against the bank may be such as the receiver may be unwilling to allow. In such case, they may be proven to the satisfaction of the receiver, or adjudica-

ted in a court of competent jurisdiction. This could not be, unless the suit could be instituted against the corporation. And for this purpose a State court is competent to adjudicate such claims.—Act of Cong. *supra*, §§ 47, 50, 52, 57; *Kennedy v. Gibson et al.*, 8 Wall. 498. For this reason, the doctrine of the case of *Paschall v. Whitsett* does not apply.—11 Ala. 472. In this latter case, the corporation was extinct before the suit was brought.—See Rev. Code, § 1775.

The record does not show that the defendant, said bank, pleaded any plea in defense of said action; and it appears that the claim of the plaintiff was fully proven. The plaintiff was therefore entitled to his judgment.—Rev. Code, § 3000. There was, then, no error in the action of the court below.

The judgment is affirmed.

[NOTE BY REPORTER.—The foregoing opinion was delivered at the January term, 1870, when Mr. Compton applied for a re-hearing, and filed in support thereof an elaborate argument, the substance of which was as follows:]

1. There is no statute providing for the continuance of actions against corporations created by an act of the congress of the United States after dissolution; the dissolution of such corporations therefore abates all suits pending at the time of its dissolution.—*Mumma v. Potomac Co.*, 8 Peters, 281; *Greely v. Smith*, 3 Story's R. 657.

Since the decision in the case of *Paschall v. Whitsett*, (11 Ala. 472,) the laws of Alabama (Rev. Code, § 1775,) have provided for the continuance of *domestic* corporations for the purpose of winding up the business of such corporations. National banking associations can not be kept alive by State laws for any purpose whatever; if so, State laws would control federal legislation, and could continue federal laws after they had ceased to exist. An act of congress made in pursuance of the constitution of the United States, is a part of the supreme law of the land,

and State laws which conflict with its provisions must yield.—Const. U. S. Art. VI, § 2; *Ableman v. Booth*, 21 How. 517.

These national banking associations exist alone by virtue of a law of congress; they are a part of the financial system of the nation; they are not dependent upon the comity of any State for the privilege of transacting business within its borders. The general government has a right to establish them in any State.—*McCullough v. State of Maryland*, 4 Wheat. 316.

The laws of Alabama in reference to such associations are precisely the same now as they were when the decision in *Paschall v. Whitsett*, *supra*, was made. The judgment of the dissolution of the association by the United States district court was rendered before the judgment in the attachment suit. The attachment was therefore dissolved by the extinction of the defendant's corporate existence; if the attachment was at an end, its hold or lien on the property was gone, and the judgment in the attachment suit, and the order directing the issuance of the *venditioni exponas* was erroneous. The fact of the dissolution of the association was established by proof to the court, before the judgment in the attachment suit was rendered.

If, then, there is any authority in law for the prosecution of suits against dissolved national bank associations, it must be found in the act creating them. Section 50 of the Currency Act provides, that claims against such associations in the hands of receivers and in process of settlement, such as the controller of the currency may not consider proved to his satisfaction, may be "adjudicated in a court of competent jurisdiction." If this section is invoked as giving such authority, the party must be bound by all its terms, provisions and purposes.

2. If the plaintiff had the right to proceed with his suit after it was shown to the court that the association had been dissolved by the decree of the United States district court, *it is admitted* that he had the right to have his claim against the association ascertained or determined by the "adjudication of a court of competent jurisdiction" by any

process available for that purpose in such a court, if he had not proved it to the satisfaction of the comptroller of the currency. He had the right to have the validity of his claim and the amount of it determined; when this was done, the claim was in the condition of those which had been proved to the satisfaction of the comptroller, and was entitled to receive a ratable dividend with other claims proved or adjudicated, from the assets of the association, after they had been converted into money and paid over to the treasurer of the United States. "The claims of creditors may be proved before the comptroller, or established by suit against the association. Creditors must seek their remedy through the controller in the mode prescribed by the statute; they can not proceed directly in their own names against the stockholders or debtors of the bank."—*Kennedy v. Gibson et al.*, 8 Wall. 506. Can they proceed against the property of such associations? Beyond the ascertainment of the validity of his claim, and the amount of it, he is not permitted to go, except in violation of section 50 of the currency act.

It is clear that under the general law, aside from the provisions of the currency act, the assets of this insolvent corporation constitute a trust fund or pledge in the hands of its receiver for the equal benefit and security of all note holders, and other creditors of such corporation, and no diligence on the part of a creditor of such corporation could defeat the right of other creditors to a ratable dividend of the funds arising from the assets of such corporation.—*Marr v. Bank of West Tenn.*, 4 Caldwell, p. 471, and cases therein cited; 2 Story's Eq. Jur. § 1252; *Wood v. Dummer*, 3 Mason's R. 308; *Gue v. Tide Water Canal Company*, 24 How. p. 257; *Hightower v. Thornton*, 8 Geo. R. 493.

But section 50 of the currency act has provided a tribunal for the express purpose of giving to creditors of such associations when they become insolvent, a speedy adjustment of its affairs, and a ratable dividend of its assets among all its creditors, excepting the government, which section 47 provides shall have a lien upon all the assets to

re-imburse the government the amount expended by it in redeeming the notes of such associations. After this lien is satisfied, all creditors who have proven their claims as required in the act, or have had them proved by adjudication, are to be paid ratably. The effect of the exercise of the authority given to the controller was, to give him exclusive jurisdiction of the affairs of this association. The terms of section 50 preclude any other hypothesis; any interference with this authority, except in the manner provided in this act, would be illegal; there would be no end to the embarrassment and conflict which would ensue from such interference. This tribunal has exclusive jurisdiction, and to it all parties must resort. As soon as it was made manifest that the United States, by the controller of its currency, had assumed the administration of the assets of this association, the State court should have discharged the levy of the attachment and given judgment on the proof of the plaintiff's claim in the manner indicated in the act, and analogous to the law respecting judgments against insolvent estates in this State.—Rev. Code, § 2209.

This attempted transfer of the property of the association by its sale under *venditioni exponas* for the purpose of the payment of the claim of plaintiff, to the exclusion of other creditors, is void. "The 50th and 52d sections of the act of Congress of June 3d, 1864, ('banking act,') apply to legal as well as to voluntary transfers by the bank." "The law will not compel a payment or transfer which it prohibits a debtor from making."

From the above quoted decision, it will be seen that the effect of the currency act is to wind up such associations in the same manner as insolvent estates. It seems to be the uniform policy of national and State laws, upon bankruptcy, or the death and insolvency of persons, or corporations, to divide the estate or assets of either, ratably among the creditors, and for this purpose to dissolve attachment liens.—U. S. Bankrupt Act, Insolvent Estates, Revised Code of Alabama. The Code of Alabama nowhere says, that the insolvency of an estate shall dissolve

attachment liens.—See §§ 2062, 2177, 2205, 2206. Yet such insolvency has been uniformly held to have that effect. *Lamar v. Gunter*, 39 Ala. p. 326; *McEachim v. Reid*, 40 Ala. 410.

The strongest term used in the Code in reference to the distribution of such estates is, *ratable payment*, (§ 2206); the language of the Currency Act is, *ratable dividend*.

3. Section 47 of the currency act provides, that the United States shall have a first and paramount lien upon all the assets of such associations, to re-imburse the United States the amount expended in redeeming the circulating notes of such associations. The controller is required by section 50, to make full provision for the payment of the amount so expended before he makes a ratable dividend of the proceeds of the assets; this provision for such payment can only be made by him. If, then, these assets can be taken under attachments before they are converted into money, the controller will be deprived of the means to secure the government the benefit of this paramount lien, and this one tribunal created by the law for the enforcement of the provisions of this act, will have taken from it by the process of a court, one of its most essential powers, and the means to perform one of its plainest duties. This is the effect of the *venditioni exponas* ordered by the circuit court, and it is insisted that such interference is against the spirit and policy, if not letter, of the currency act.

If property, when attached, is subject to a lien *bona fide*, placed upon it by the defendant, that a lien must be respected and the attachment postponed to it.—Section 223, Drake on Attachment, and cases cited.

And this rule extends to those created by law.—*Taylor v. The Royal Saxon*, 1 Wallace, jr. 311. In the case of *Peale v. Phipps*, 14 Howard's Rep. p. 375, Taney, C. J., says:

“In the case of *Wiswall v. Simpson's Lessee*, 14 Howard, 52, the court held that where certain lands were in the hands of a receiver, appointed by the chancery court of Alabama, in a case pending before it, they could not be sold by the marshal upon process of execution issuing out

of the circuit court of the United States for that district, although the judgment upon which the process issued, was a lien upon the land, and the execution was laid before the receiver obtained actual possession of the property."

If a receiver had been wrongfully appointed by reason of an alleged refusal of the association to pay its circulating notes, the association could have applied to the nearest United States court, within ten days after receiving notice of the appointment of such special agent, and enjoined further proceedings in the premises.—§ 50, Currency Act.

A modification of the opinion rendered at this term in this cause, is asked to the extent of setting aside the judgment of the circuit court, so far as it authorizes the issuance of a *venditioni exponas*. In this event, the appellee will receive the whole of his debt, if there be assets, and his satisfaction by a rateable dividend, if there be a deficit.

The application was responded to as follows by—

PETERS, J.—The application for rehearing in this case is overruled, with costs. The plaintiff in the court below, who is appellee in this court, was entitled to his judgment in the circuit court. The opinion delivered in this case is not intended to go beyond this, and settle the rights of the parties under the levy of the attachment. If the judgment below was correct, then the plaintiff's rights under the judgment to have it enforced necessarily followed, unless they were defeated by some superior right in favor of the defendant, or some third person.—Revised Code, §§ 2837, 2838, 2868, 2955; *Autrey v. Walters*, June term, 1871. In this case the defendant had no right against the plaintiff which was not settled by the verdict. And in such a suit no third person will be permitted to intervene to defeat the right of the plaintiff to his judgment. This question is sufficiently apparent from the authorities cited in the opinion in the principal case, without further discussion.

HART *vs.* SHORTER & BAKER, EX'RS.

[ACTION ON BILL OF EXCHANGE,]

1. *Bill of exchange; how may be drawn.*—A bill of exchange may be drawn payable to the order of the maker and indorsed by him to a third person; the indorsee may sue the acceptor as if he were the payee.
2. *Same; to whom may be transferred.*—Such a bill of exchange may be transferred by indorsement to an administrator or executor in this State.
3. *Same; indorsee may sue in his own name.*—And under our statutes such indorsee may sue thereon in his own name as the owner.—Rev. Code, §§ 1838, 2525.

APPEAL from Circuit Court of Barbour.

Tried before Hon. J. McCaleb Wiley.

The facts are sufficiently stated in the opinion.

J. L. PUGH, for appellant.

SHORTER & McKleroy, *contra*.

(No briefs came into the hands of the Reporter.)

PETERS, J.—This is an action of debt founded on a bill of exchange. The complaint is in the following words:

“John Gill Shorter and Alpheus Baker, Ex'rs, plaintiffs,
vs. Henry C. Hart, defendant.

“The plaintiffs, as the executors of the last will and testament of Milton A. Browder, deceased, claim of the defendant two thousand, seven hundred and forty-four 25-100 dollars, besides ————— due on a bill of exchange, which was drawn by one Thomas H. B. Rivers, on the fifth day of September, A. D. 1862, for the said sum upon Clark & Hart, a firm composed of one John W. Clark and the defendant, and of which firm the defendant is surviving partner. The said bill was accepted by the said Clark & Hart, and was payable to drawer's own order on the first day of January, A. D. 1863, which said

Hart v. Shorter & Baker, Ex'rs.

bill, before maturity, was indorsed to the plaintiffs, and, with interest, is still due and unpaid."

On this complaint the following judgment was rendered on the 27th day of May, 1868, in favor of the plaintiffs, that is to say :

"Came the parties by their attorneys, and issue being joined on the plea of general issue, then came a jury of good and lawful men, to-wit, John C. McEachen, foreman, and eleven others, who, on their oaths, say they find the issue for the plaintiffs, and assess their damage at three thousand, nine hundred and thirty-four 15-100 dollars; it is thereupon considered by the court, that the plaintiffs recover of the defendant the damages so assessed, and also the costs in this behalf expended, for which let execution issue."

From this judgment the defendant in the court below brings the case to this court by appeal. And he now assigns as error—1st. "That the complaint is by executors upon a bill of exchange payable to the drawer's own order, and indorsed by the drawer and payee to the complainants as executors, and that by such indorsement no legal title or other right of action was vested in complainants as executors." 2d. "Also, that the complaint shows no right of action in complainants against the defendant."

The complaint above quoted is in the form prescribed in the schedule of forms given in the appendix of the Revised Code. Such forms are sufficient.—Revised Code, p. 673. Here the complaint shows a sufficient cause of action. There was a trial and verdict for the plaintiffs in the court below, and there was no objection to the complaint or to the right of the plaintiffs to sue upon the contract alleged. In such case, the judgment will not be arrested, annulled or set aside for matters that might have been previously objected to.—Rev. Code, § 2811. A bill of exchange may be drawn payable to the order of the drawer, and when indorsed the indorsee becomes the payee, and he may sue the acceptor.—Story on Bills of Exchange, § 35. Such a bill of exchange is not illegal, and it may be transferred to an executor or administrator by indorsement, and the in-

dorsee may sue thereon in his own name. Story on Bills, §§ 56, 198 ; Rev. Code, §§ 1838, 2523. I therefore think that this action was properly brought, and that the errors assigned can not be sustained.

Let the judgment of the court below be affirmed.

CURTIS ET AL. vs. GAINES, ADM'R.

[ACTION ON PROMISSORY NOTE.]

1. *Discontinuance ; what operates as in a joint action on a promissory note.*
In a joint action on a promissory note against three parties, if the summons is executed on two of the defendants, and returned not found as to the third; and, in that posture of the case, the plaintiff continues the cause as to the defendant not found, and takes a judgment against the other two, the entire case is thereby discontinued.
2. *Same ; how and when may be corrected.*—Such a mistake may be corrected before the adjournment of the court ; but after the end of the term, and the final adjournment of the court, the court ceases to have any power to correct the error, and a motion by the plaintiff, at a subsequent term, to set aside the judgment and re-instate the case on the docket, should be denied.
3. *Discontinuance ; effect of.*—A discontinuance puts an end to a case. The parties are thereby out of court, and the plaintiff must begin *de novo*.
4. *Erroneous order setting aside final judgment ; effect of appearance and defense of suit afterwards.*—Mere irregularities may be waived by a subsequent step taken in a cause, but substantial errors will not be. If a plaintiff, against the objection of the defendants, improperly obtains an order of the court setting aside a final judgment obtained by him at a previous term, and re-instating the cause on the docket, the appearance of the defendants, on a trial afterwards had, will not be a waiver of the error.

APPEAL from Circuit Court of Choctaw.

Tried before Hon. LUTHER R. SMITH.

The facts are sufficiently stated in the opinion.

JOSHUA MORSE, for appellant.

WATTS & TROY, *contra*.

(No briefs came into Reporter's hands.)

PECK, C. J.—On the 6th of January, in 1867, the appellee, as the administratrix of A. L. Gaines, deceased, commenced her suit in the circuit court of Choctaw county, against the appellants, E. S. Curtis, R. A. Burnett and Joshua Morse, founded on a promissory note, made by defendants to the plaintiff, on the 4th day of January, 1866, and payable twelve months after date, with interest, &c.

The summons was returned on the 4th of January, executed on defendants Curtis and Burnett, and not found as to defendant Morse.

At the March term of said court, 1867, the plaintiff continued her suit as to the defendant Morse, upon whom the summons was not executed, and took a judgment by default against the other two.

At the September term, 1870, the plaintiff moved the court to vacate said judgment against said defendants Curtis and Burnett, and to re-instate the cause on the docket against said Curtis and Burnett, as well as against said Morse, on the ground that said judgment was void, the same having been rendered by a judge who was, at the time, the plaintiff's uncle. The minute entry shows that the defendants Curtis and Burnett appeared by attorney, and the defendant Morse in his own person, and resisted said motion. The relationship of the judge, by whom the said judgment was rendered, to the plaintiff, was admitted.

The court sustained the motion, vacated and set aside the said judgment, and re-instated the cause on the docket as to all three of the defendants. To this ruling of the court, the defendants excepted. A trial at the same term was then had. The bill of exceptions states, that the cause being re-instated, the parties proceeded to trial, on its merits; that the defendants Curtis and Burnett pleaded a former recovery, to which the plaintiff replied. No plea

appears to have been filed by the defendant Morse. The minute entry, however, shows that he appeared in person. In this condition, the case was submitted to a jury, and there was a verdict and judgment for the plaintiff, against all the defendants.

The defendants have appealed to this court, and assign for errors—1st, The judgment of the court at the March term, 1867; 2d, The order and judgment of the circuit court, vacating the judgment by default and re-instating the cause on the docket, as to all the defendants; and 3d, The final judgment against all the defendants.

1. It is very clear, that the judgment by default against the defendants Curtis and Burnett, at the March term, 1867, in the then state of the case, without a discontinuance as to the defendant Morse, was erroneous.

In an action on a joint and several promissory note, against two or more parties, the plaintiff must recover against all or none of the defendants.

This is the rule at the common law.—1 Ch. Pl. 14 Am. from 6 London ed. p. 45. And this is so, even where a defense personal to one defendant is pleaded, as infancy or coverture. The common law rule, however, has been modified in this State, so that when a defense, personal to one defendant, is pleaded, the plaintiff may enter a *nolle prosequi* as to such defendant, and proceed to judgment against the others.—*Ivy v. Gamble*, 7 Porter, 545; *Keeble v. Ford and Vining*, 5 Ala. 153; *Whitaker v. Van Horn*, 43 Ala. 255. The same practice prevails in New York.—*Hartness v. Thompson*, 5 I. R. p. 160; and, also, in Massachusetts, *Woodward v. Newhall*, 1 Pick. 500; and in many other States.—See note 3, p. 45, 1 Ch. Pl., *supra*.

In such a case, where the summons is served on some of the defendants, and returned not found as to the others, § 2545 of the Revised Code permits the plaintiff to discontinue his suit as to the party or parties upon whom the summons is not served, and proceed to judgment against those upon whom it has been executed. In the present case, the summons was executed upon defendants Curtis

and Burnett, and returned not found as to the defendant Morse. In this posture of the case, the plaintiff moved the court to continue the cause as to the defendant Morse, which was done, and took a judgment by default against defendants Curtis and Burnett, thus destroying altogether the continuity of the action.

What effect did this have on the plaintiff's suit? Did it not operate a discontinuance of the issue, as to all of the defendants? We think it did. We have no statute authorizing a joint action to be severed, and its unity destroyed in this manner.

Where a suit is against several defendants, on a joint, or joint and several cause of action, if the summons is served on some, and returned not found as to others, the above section of the Revised Code permits the plaintiff, at his election, to sue out an *alias*, or discontinuance, as to those on whom the summons is not served, and proceed against the others; but we know of no rule of practice, either at the common law, or any authorized by statute, that will justify the course pursued by the plaintiff in this case. The case of *Givins v. Robins and Painter*, 5 Ala. 676, is, in principle, very like the present. In that case, it is decided that when an action is commenced against three, jointly, continued as to two, and judgment rendered against the third, the entire action is discontinued. The only difference between that case and this is, in that case the summons was executed on all the defendants, and it being suggested to the court that two of the defendants had applied for the benefit of the bankrupt law, thereupon the cause, as to them, was continued, and a judgment was rendered against the other defendant. This was assigned for error, and the judgment, for this cause, was reversed, the court holding, that the *entire action* was discontinued. This difference does not affect the principle, but it is applicable, alike, to both cases.

2. The motion of the plaintiff, at the September term of the court, 1870, to vacate the said judgment by default against the defendants Curtis and Burnett, at the March term, 1867, and to re-instate the cause on the docket, as to

all the defendants—the defendant Morse, as well as the other two—should have been denied. A discontinuance puts an end to a cause. The parties are, thereby, out of court, and the plaintiff must begin *de novo*.—1 Dunlap's Pr. 486 ; 3 Black. Com. 296. Before the close of the term, such an error may be corrected, but after the end of the term, and the final adjournment of the court, the court ceases to have any power over its records, except to correct clerical errors, where the record affords matter upon which to base such correction.—*Van Dyke v. The State*, 22 Ala. 67. Therefore, whether the judgment of the court at the March term, 1867, be considered *void* or *voidable*, will not better the plaintiff's condition, in either case. The court had no power to correct the error, or to relieve the plaintiff from the effects of it, when this application was made.

Furthermore, the plaintiff suffered the matter to sleep for more than two years and a half, after the judgment by default was rendered, before she sought to set the same aside; and without any continuance or step in the case, or any notice taken of it, whatever, until the period limited for suing out an appeal had elapsed. This, if there was no other reason, should have defeated the plaintiff's motion; consequently, the exception of the defendants to the ruling of the court was well taken. The appearance of the defendants, on the final trial, was no waiver of the errors of the court. Mere irregularities may be waived, by taking a step in a case, after they are committed, but substantial errors are not.

The judgment of the court below must be reversed ; and, as the action in that court has been discontinued, and the plaintiff must begin *de novo*, the cause is not remanded. The appellee will pay the costs in this court and in the said circuit court.

HALL *vs.* CRESWELL.

[ACTION BY MARRIED WOMAN IN HER OWN NAME TO RECOVER MONEY LOANED
BY HER, &c.]

1. *Husband, authority of, as trustee of wife's separate statutory estate; what action of wife can not divest*—A wife cannot divest her husband of his authority as her trustee over her separate statutory estate, by contracting with one to whom she lends money, that the borrower is to pay it to her and not to her husband, he not being a party to the agreement.

APPEAL from Circuit Court of Wilcox.

Tried before Hon. P. O. HARPER.

The complaint in this case was as follows :

“Lydia Creswell } The plaintiff, a married woman, and
vs. } wife of William H. Creswell, claims
R. C. Hall. } of defendant \$91.80, due by account
for money loaned to him by plaintiff in the year 1860, with
interest thereon. Plaintiff avers that she is a married
woman, the wife of William H. Creswell; that she has a
separate estate secured to her by the statute of Alabama,
commonly called the married woman’s law, and that the
money sued for constitutes part of said separate estate.”

The defendant demurred to the complaint—

1st. Because the suit is not brought by next friend.

2d. Because the complaint does not state that the money
sued for is part of the *corpus* of plaintiff’s statutory separate estate.

The court overruled the demurrer, and thereupon defendant pleaded payment, coverture of plaintiff, and set-off, &c., and upon these pleas plaintiff took issue.

The money was borrowed of plaintiff as alleged in the complaint, but the defendant proved that before the suit was commenced, he had paid the same to the husband of plaintiff.

It was proved that at the time of the loan, defendant

promised to pay the money back to plaintiff herself, and that she then informed him that her husband had nothing whatever to do with the transaction.

It was also proved that at the time of the loan, as well as at the date of the payment, plaintiff was a married woman and the wife of William H. Cresswell and was living with him.

This being the substance of the proof, the court charged the jury, "that the husband had no right to receive the money due the wife, belonging to her statutory separate estate, under the evidence in the case, and that section 2375 of the Revised Code of Alabama, applied only to property to which she might be entitled; but that after the property was received, the husband's right or power to receive moneys loaned by the wife, was not covered by the statute." The court refused to give a charge asked by defendant, asserting the converse of the propositions of law enunciated in the charge given, and the defendant duly excepted to the charge given and the refusal to give the charge asked.

There was a verdict and judgment for the plaintiff, and hence this appeal.

The errors assigned are—

1st. Overruling the demurrer.

2d. The charge of the court.

COCHRAN & DAWSON, for appellant.

——— McCASKILL, *contra*.

(No briefs came into the Reporter's hands.)

B. F. SAFFOLD, J.—Section 2375 of the Revised Code authorizes a husband to receive property coming to his wife, or to which she is entitled, and makes his receipt therefor a full discharge in law and equity. Section 2372 vests in him as her trustee her separate statutory estate, with the right to manage and control the same without accountability to her for the rents, income and profits thereof. The wife can not, therefore, divest her husband of his authority as her trustee over her property by a con-

Latham et al. v. Staples.

tract with one to whom she lends money, that he is to pay it back to her and not to her husband, he not being a party to the agreement.

The judgment is reversed and the cause remanded.

LATHAM ET AL. *vs.* STAPLES.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN.]

1. *Vendor's lien, when exists ; how may be enforced.*—L., the vendee, being indebted to H.,* the vendor, for the purchase-money of land, the indebtedness constituting a vendor's lien thereon, L., at the request of H., gave his promissory note to S., a creditor of H., for the amount due by H., and received a corresponding credit from H. for the amount of the note given S., all the parties agreeing at the time that the note thus given to S. should carry with it a vendor's lien to the amount of the note,—*Held*, that S. might enforce a vendor's lien on the land by bill in equity against L., and that H. was a proper party defendant to the bill.
2. *Unsworn answer, denials in ; when prevail.*—When a cause is heard upon the bill and exhibit to the bill, the answer and exhibits to the answer of one of the defendants, and a decree *pro confesso* against the other defendant, and the complainant has waived the oath of the defendants to the answers, and there is no testimony taken by any of the parties, and the answer submitted on the hearing is a responsive denial of all the grounds of equity alleged in the bill, such an answer must prevail against the bill.
3. *Unsworn answer, effect of ; what required to overturn.*—An unsworn answer does not lose all force as evidence in a cause where it is responsive to the bill. It only changes the rule that requires the testimony of two witnesses, or one witness and strong corroborating circumstances, to overturn it. A mere preponderance of evidence is sufficient for that purpose.—Rev. Code, § 3352.
4. *Final decree on reversal, when will not be rendered by supreme court.*—A decree will not be rendered here, when it is possible that a different result more favorable to justice, might be obtained by remanding the cause,

APPEAL from Chancery Court of Calhoun.

Heard before Hon. B. B. McCRAW.

On the 24th of September, 1864, Staples filed his bill against Latham and Hollingsworth, alleging that Latham bought a tract of land, lying in this State, from Hollingsworth, in the year 1865, for the sum of about seventeen hundred dollars, and that, to secure the payment of this sum, he executed his written obligation for that amount, payable to Hollingsworth; that after this sale, Hollingsworth became indebted to Staples by promissory note in the sum of \$300. On this last named note there was a payment of forty dollars, which left a balance of \$260 due from Hollingsworth to Staples; that afterwards, Staples, Hollingsworth and Latham met together, and entered into an agreement that Latham should give his note to Staples for the amount that was due from Hollingsworth to Staples, and have a credit for the same on the note to Hollingsworth for the purchase-money of the land; that in conformity with this agreement, Latham executed and delivered his note to Staples for \$260, and received a credit for the same on the note to Hollingsworth for the purchase-money of the land, and Hollingsworth was discharged from his liability to Staples; that the note for \$260, thus given by Latham to Staples, was a transfer of so much of the claim for the purchase-money of said lands as the amount of said \$260, and that this transfer carried with it, by agreement of the parties, the vendor's lien on the land sold by Hollingsworth to Latham to the amount of the note to Staples. The bill is filed to enforce this lien in favor of the complainant, Staples. There was a demurrer by Latham to the bill for want of equity and misjoinder of parties. This was overruled. Latham then answered without oath, his answer on oath having been waived, and flatly denied, from personal knowledge, all grounds for the equitable lien set out in the complainant's bill. Hollingsworth failed to answer, and a decree *pro confesso*, on publication, was taken as to him. The cause was heard upon the bill and exhibit, the answer of Latham and exhibits, and the decree *pro confesso* against Hollingsworth. There was no testimony taken by any of the parties. The chancellor decreed that the complainant

Staples was entitled to a vendor's lien on the lands sold by Hollingsworth to Latham, and mentioned in the bill, to the extent of the note for \$260, and decreed that the lien to this extent be enforced by sale.

From this decree Latham brings the case by appeal to this court, and here assigns the proceedings in the court below for error.

WALKER & MURPHEY, for appellant.—The equity of the bill (if it contains any,) obviously depends upon the allegation that Latham gave his note to Staples, accepting a credit *pro tanto* upon his debt for the purchase-money of land to Hollingsworth, and that there was thus transferred to Staples, the complainant, a part of the debt of Hollingsworth for the purchase of the land, with an agreement for the continuance of the lien.

Now, all the allegations of the bill on this subject are positively denied. There was no proof sustaining the bill, and of course the complainant was not entitled to a decree.

The vendor's lien would have been lost by the discharge of Latham *pro tanto* from liability to Hollingsworth, and the giving of a new note to Staples.—*Bradford v. Harper*, 25 Ala. 337; *Hall v. Click*, 6 Ala. 363.

The averment that there was an agreement for the continuance of the lien in favor of Staples is denied, but if proved it would have been of no avail, unless in writing.

TAUL BRADFORD, *contra*.

PETERS, J.—There can be no doubt now, that in this State, a promissory note given for the purchase-money of land is secured by a vendor's equitable lien upon the land sold, unless, in the contract of sale, this lien has been released. This lien attaches to the debt, and is transferable with the note for the purchase-money; though, at the same time, it may be released when the note is assigned without recourse, or when the debt itself is changed without intention to preserve the lien.—*Conner v. Banks*,

18 Ala. 42; *Kelly v. Payne*, 18 Ala. 371; *Brooks v. Woods*, 40 Ala. 538; *White v. Stover et al.*, 10 Ala. 441; *Haley v. Bennett*, 5 Port. 452; *Hall's Ex'rs v. Click et al.*, 5 Ala. 363; *Day v. Preskett*, 40 Ala. 624; *Griggsby v. Hair*, 25 Ala. 327; *Bradford v. Harper*, 25 Ala. 337; *Newsome et al. v. Collins*, 43 Ala. 656; 4 Kent, 150, *et seq.* The transfer of the note thus made for such purchase-money on a sale of land may be by parol. It is not a transaction that is affected by the statute of frauds. It is the debt that is parted with, and not the land; and the debt carries along with it all its incidents, if there be no stipulation to the contrary.—40 Ala. 624, 628, *supra*. But here the bill alleges that a portion of the debt for the purchase-money was transferred, and that the lien allowed by law for its security was likewise expressly transferred with it, by agreement of all the parties interested in it. In such case, all the owners of the debt entitled to participate in the fruits of the lien should be made parties to the suit to enforce the lien.—25 Ala. 327, *supra*. The demurrer was therefore properly overruled.

The cause in the court below was heard on bill and answer, without testimony, but the complainant waived the oath of the defendant to the answer. In such case, the answer, when it contradicts the allegations of the bill, is a mere pleading, and it is still required that the allegations of the bill shall be sustained by some proof sufficient to overturn the contradictions of the answer; but the force of this proof may be simply that of a preponderance of the evidence in favor of the complainant, without demanding, as in case of a sworn answer, two witnesses, or one witness with strong corroborating circumstances, to outweigh the denials of the answer. The Code changes the former rule.—Rev. Code, § 3352; *State B'k v. Edwards et al.*, 20 Ala. 512; *Mosser v. Mosser*, 29 Ala. 313; *Paulding v. Watson & Eidson*, 21 Ala. 279; Greenl. Ev. pp. 8, 9. The allegations of the bill which support the equity of the complainant's case are directly and fully contradicted by the denials of the answer, made upon the personal knowledge of the defendant, and there is no evidence sufficient

to support the bill. In such case, the denials of the answer must prevail.

For the foregoing reasons the decree of the court below must be reversed. And although this court is clothed with the power to render such judgment here as the court below should have rendered, yet, as the cause might thus be disposed of on a mere suggestion in the pleadings, for which no one but the pleader who drew up the unsworn answer would be responsible, and the complainant is entitled to support his bill by his own testimony, which may not be contradicted by the defendant, the cause will be remanded for final disposition in the court below, where the ends of justice may be more certainly and more fully attained.—Revised Code, §§ 3502, 2704.

Let the decree of the court below be reversed, and the cause remanded. The appellee, Staples, will pay the costs of this appeal in this court and in the court below.

HIGHTOWER ET UX. vs. MOORE.

[APPLICATION FOR REMOVAL OF ADMINISTRATOR.]

1. *Failure to make settlement ; when not good ground for removal of administrator.*—An administrator ought not to be removed for merely failing to make regular settlements, when no damage to the estate is shown, and he has not been required to do so, by either the court or those interested.
2. *Receipt of Confederate currency by administrator ; when no ground of removal.*—It is no ground for removing an administrator now, that in 1864 he received Confederate currency in payment for property of the estate sold by him.

APPEAL from Probate Court of Russell.

Tried before Hon. T. L. APPLEBY.

THIS was an appeal by Hightower and wife from the or-

der of the probate court dismissing their petition filed on the 10th day of July, 1869, for the removal of appellee as administrator of the estate of Matthew Matthews, deceased, Hightower's wife being an heir of said decedent.

The grounds alleged are—

1st. That the administrator has not made any settlement since December, 1865.

2d. That he has failed to make settlements.

3d. That he had sold property of the estate and taken Confederate money in payment therefor.

On the hearing of the application, the appellee introduced in evidence all the records of the probate court in relation to his administration of said estate. From these records it appears that appellee was appointed administrator in April, 1864. The slaves belonging to the estate were distributed among the distributees in September, 1864. In the same year an order was made, on the application of the administrator, for the sale of certain personal property of the estate, and also certain real estate, for the purpose of a division, &c. On the 9th of December, 1864, he reported the sale, &c., to the probate court, and on the 15th of the same month the court set aside the sale, so far as part of the real estate was concerned, and directed another sale. Both the land and personal property were sold for Confederate currency. On the 9th of January, 1865, the administrator made another sale, and reported the same to the court. This sale, with the exception of small portions of the real estate, was confirmed, &c., and as to said land, a re-sale was ordered.

Appellee's having filed his accounts and vouchers for an annual settlement, the same were passed and allowed, at the February term, 1865, and decrees rendered against him in favor of the respective distributees. These decrees the administrator satisfied.

In December, 1865, appellee filed his accounts and vouchers for a final settlement and a day was set to hear the same, but the record is silent as to what was done in the matter. At the May term, 1866, it appears that the court passed and allowed the accounts and vouchers filed by the

administrator for an annual settlement, and it appeared that the estate was indebted to the administrator in a small amount.

It also appears that on the 30th day of January, 1865, the administrator re-sold certain lands of the estate under the order heretofore referred to, and filed his report of the sale. This sale seems to have been confirmed in February, 1865, although the record does not set forth the order; for in March, 1866, certain distributees petitioned the court for "a new trial of the order heretofore granted confirming the sale," &c., at the February term, 1865. At the August term, 1866, the court being "fully satisfied that the administrator acted in good faith, and that the land did not sell for an amount disproportionate to its value," dismissed the petition, &c.

No citation was ever issued to the administrator requiring him to file his accounts, &c., for settlement.

It was admitted that the administrator had made no settlement of the estate in three years and a half. It was also admitted that the administrator would swear, if present, that he had regularly complied with the requirements of the law and the court, and that he would have made annual settlement each year, if he had not been excused by the court in consequence of an application to compel him to give a new bond, &c. The records, however, did not show any order excusing him, and the probate judge's statement being taken as evidence, by consent, he stated that he had never excused the administrator from making settlement.

This was substantially all the evidence on the hearing. Upon it the court dismissed the petition.

G. D. & G. W. HOOPER, for appellant.

WILSON WILLIAMS, *contra*.

(No briefs came into Reporter's hands.)

B. F. SAFFOLD, J.—The appellants petitioned the probate court for the removal of the appellee from the administration of the estate of Matthew Matthews, deceased.

They alleged, as grounds of removal—1st. That he had not made any settlement since December, 1865. 2d. That he had failed to make settlements. 3d. That he had sold property of the estate and taken Confederate currency in payment. On the hearing, the court dismissed the application.

The last cause of removal alleged by the petition in 1869 can not be regarded as sufficient, inasmuch as the acts complained of were done four years before, and can not be repeated. Besides, the time when they were done, and the attendant circumstances, do not admit of the inference that the administrator was inefficient or disposed to waste the property.

There appears to have been a settlement of the estate in 1865, at which decrees were rendered in favor of the distributees against the administrator, and were satisfied by him. The estate seems to have been fully administered, though perhaps not entirely distributed. The administrator has been negligent about making his settlements, but there has not been much to do since his last settlement, and he has not been required to make settlements by either the court or the distributees. The record shows that in December, 1865, he filed his accounts for a final settlement, and that a day was appointed to hear it, but it does not show what was done in the matter.

The statement of what the administrator would swear, if present, admitted as evidence by counsel, tended to prove a reason why he had not made regular settlements, but it was contradicted by the evidence of the probate judge himself, and of course had no influence in his decree.

We do not think sufficient ground for the removal was shown.

The decree is affirmed.

HUDSPETH ET AL. vs. THOMASON.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN AND TO REFORM DEED OF CONVEYANCE, &C.]

1. *Chancery ; when has jurisdiction to reform deeds, &c., to require execution of deeds in place of those destroyed.*—A court of chancery has ample jurisdiction to reform deeds and other written instruments, on the ground of mistake, even upon parol evidence, where no statutory provision intervenes to prevent it ; and where a conveyance of lands has been accidentally lost or destroyed, so that the purchaser is, thereby, unable to show a good title, the vendor may be required to make the purchaser another deed.
2. *Bill to correct misdescription of deed ; what no defense to.*—On a bill, by a vendee to correct a mistake in the description of the land bought, it is no defense that the vendor was paid in Confederate treasury notes, if voluntarily received by him, where the vendee is chargeable with no deceit or fraud on his part.
3. *Same ; when the same bill may join one defendant to have a deed reformed and with another against whom vendor's lien is sought to be enforced.*—It A buy lands of B, and pay for them, and receive B's deed for the same, in which, by the inadvertence and mistake of B, the lands are misdescribed, and after A's purchase, and before the mistake is discovered A sells the same lands to C, the brother of B, who pays half of the purchase-money, and gives his promissory note for the remainder, and takes A's bond for titles ; if after the mistake is discovered, B refuses to correct the mistake, and he and C combine and confederate together, to prevent the correction of the mistake, and, also, to avoid the payment of the remainder of the purchase-money, on the part of C, A may join both in a bill to correct the mistake, and to set up and enforce his lien on the lands, for the unpaid purchase-money.
4. *Same ; when not error to treat cross-bill as waived.*—On such a bill, if the defendants make their answers a cross-bill, but take no steps to obtain an answer to their cross-bill, and go to a hearing on the original bill, answers, and cross-bill and exhibits, the chancellor may dismiss the cross-bill, or treat the same as waived on the part of the defendants, and proceed to decree the relief prayed in the original bill, if the admissions in the answers will authorize it.

APPEAL from Chancery Court of Barbour and Henry.
Heard before Hon. B. B. McCRAW.

The appellee, Thomason, who was a non-resident and

complainant in the court below, filed his bill against R. T. and Joel A. Hudspeth, the appellants, seeking to enforce a vendor's lien on six hundred and thirty acres of land mentioned in the bill, and to have corrected certain misdescriptions in the deed therefor, which had been executed to him by R. T. Hudspeth, and prayed for general relief, &c.

It appears from the bill and answers that appellee, in 1863, through his agent, one Edwards, purchased the lands mentioned from R. T. Hudspeth, paid him the whole price therefor in Confederate currency, and received a warranty deed therefor from said Hudspeth and wife at the time of the sale. This deed was destroyed by Sherman's army in passing through Georgia in 1864. There is nothing in the proof to show who was in the possession of the land from the date of the sale up to the year 1865, except the denial of R. T. Hudspeth that he had ever surrendered his possession.

The bill charges, that in the year 1865 R. T. Hudspeth rented the lands of appellee, through Edwards, his agent, and acknowledged at the time that the land belonged to appellee, and paid rent therefor; that, in 1866, complainant sold the lands to Joel A., a brother of R. T. Hudspeth, who was then living on the land, gave said Joel A. a bond for titles, received from him \$1500 in cash and his promissory note for a like amount, for the remainder of the purchase-money, and appellee then put him in possession, &c.; that, after this, by some collusion and fraud, said Joel A. put R. T. Hudspeth in possession of the land, who now claims title thereto in himself; that both defendants deny complainant's rights in the premises, and said Joel A. refuses to pay the remainder of the purchase-money, although long since due.

All the parties, at the time of the transactions mentioned in the bill, were of full age and acting in their own right.

R. T. Hudspeth, in his answer, admits the sale as alleged; that both parties assented to the sale of the same land, (being that described in the bill,) and that in making the deed he "intended to put in the right numbers," but

alleges, that by inadvertence and mistake, he drew up the deed so that it conveyed only eighty acres of the six hundred and thirty sold ; that, as to the remainder of the land mentioned in the bill, "there was no writing signed by the parties to be bound thereby, or by any one authorized to bind them, or either of them, containing said contract of purchase or any part thereof ;" that the sale of the lands, except the eighty acres, was wholly verbal and in parol, and supported only by a payment of Confederate money. He admits, that after the sale, and until he became aware of the mistake, that he considered the land as belonging to complainant; that after this, discovering the mistake, "knowing that the price paid was grossly inadequate and paid in an illegal currency, he determined to avail himself of all the legal advantages given him by law under the facts, and that he refused to recognize complainant's rights in the premises." He also denies that he ever surrendered possession of the lands to complainant, or lost dominion of the land, unless "by reason of his considering it to belong to complainant," and holding under these circumstances, when he was ignorant of the mistake in the deed, and, therefore, believed that the legal title to the land was in complainant. The answer now states when the discovery of the mistake was made, and denies that Joel A. was ever, legally, in possession of said lands, and alleges that what was charged as a payment of rent was money paid by respondent to said Edwards for his trouble in bringing about the sale between complainant and respondent, and not as rent. Joel A. Hudspeth, in his answer, alleges that at the time of the sale complainant had the legal title to only eighty acres of the land, and could not make title to the remainder ; that for this reason the real consideration of the sale to him has failed ; that this defect of title was not discovered by him until after the sale, and that when he discovered this, and "became aware that his brother and correspondent had received only a trifling sum in an illegal consideration for the sale of the lands, he determined to render no assistance to complainant in consummating his speculation, and agreed with co-defendant

that the facts, as set forth in their respective answers, be submitted to the chancellor for such decree as equity demanded." He also denies that complainant was ever in possession of the land, unless the facts stated in the answer of his co-defendant amount to possession, but admits that the \$1500 note is still due.

In both answers, which were sworn to, all collusion, combination and fraud are denied, and each prays that their respective answers be taken as cross-bills; that complainant be made a party defendant thereto by publication, and required to answer the several allegations thereof without oath, and that the chancellor will grant them, respectively, "such relief upon the facts set up," in their answers, "as to equity seems meet." In both answers respondents offer to allow complainant a rebate to the amount of the value of the Confederate money paid for the land to R. T. Hudspeth, upon the repayment by complainant of the \$1500 received by him from Joel A. Hudspeth.

The bill was filed in March, and the answers in April, 1869. Up to the May term, when the cause was heard, nothing was done towards making complainant a party by publication or otherwise; no answers had been filed by complainant, and no decree *pro confesso* had been taken against him.

The cause was heard upon the original bill, and the answers, and, on the hearing, the chancellor dismissed the answers as cross-bills, and decreed that complainant was entitled to the relief prayed; that the note of A. J. Hudspeth was a lien on the lands mentioned in the bill, for the unpaid purchase-money, and that the land be sold for the payment of the same, &c.; that all title of R. T. Hudspeth, to the lands mentioned in the bill, be divested out of him and invested in complainant, and that said Hudspeth execute a valid and correct deed to complainant of the lands mentioned in the bill, within ten days, &c.

The defendants appeal, and here assign as error the dismissal of the answers as cross-bills, and the decree rendered by the chancellor.

PUGH & BAKER, for appellants.

W. C. OATES, and WATTS & TROY, *contra*.

PECK, C. J.—This case originated in the chancery court of Henry county, by a bill filed by the appellee as plaintiff, against the appellants as defendants. The objects of the bill were—1st. To reform a deed of conveyance of certain lands sold by the defendant, R. T. Hudspeth, to the plaintiff, and correct a mistake in the description of the land as set forth in said deed ; and 2d. To set up and enforce a vendor's lien on the same land, which were afterwards, and before the discovery of the mistake, sold by plaintiff to the defendant, A. J. Hudspeth, the brother of said R. T. Hudspeth.

There can be no doubt that a court of chancery has ample jurisdiction to reform and correct mistakes in deeds and other written instruments, even upon parol evidence, where no statutory provision intervenes to prevent it.—Adams' Eq. 168–9, ma. note 1 ; and, if a conveyance to a purchaser has been accidentally lost or destroyed, so that the purchaser, thereby, is unable to show a good title, the vendor may be compelled to make another deed of conveyance.—Adams' Eq. 167, ma. note a., and Willard's Eq. 300–1.

On these authorities it was competent for the chancellor to correct the mistake in the description of the land, in the deed of the defendant, R. T. Hudspeth, to the plaintiff, and the deed being lost, or destroyed, it was not improper to require him to execute another deed containing a correct description of the land sold by him to the plaintiff.

The mistake was fully admitted in his answer, and that is sufficient to sustain the chancellor's decree.

The objection made by him, in his answer, to reforming the said deed and correcting the mistake, is without force. The fact that the land was paid for in Confederate money or treasury notes, did not affect the validity of the sale.—*Ponder et al. v. Scott*, 44, 241. No deceit or fraud on the part of the plaintiff or his agent, by whom the purchase was made, is pretended. The purchase was made in good faith, and the vendor voluntarily received his price, all he asked for his land, in Confederate money, and made a deed

that he believed, at the time, described the land correctly ; but, as he admits in his answer, by his own inadvertence and mistake only described correctly a small part of the land ; therefore, it is but the plainest equity and justice to require him to correct his own mistake.

2. The chancellor decided correctly in holding that the plaintiff had a lien on the same lands for the unpaid purchase-money due to him, on the sale made to the defendant, A. J. Hudspeth, before the mistake in the plaintiff's deed was discovered. Said defendant admits the purchase, and the note given by him to the plaintiff, made an exhibit to the bill, and that the same, with the exception of the credit entered upon it, is due and unpaid. The decree properly declared the said note a lien upon the said lands, and required the same to be paid within the time specified, or that the lands should be sold by the register.

There was no objection made in the chancery court to the frame of the bill, or in the manner of its verification.

The bill charges a combination between the defendants, and although there is a seeming denial on their part, yet no one can read their answers without clearly seeing that said defendants were acting in concert and with a common design—1st. To defeat the correction of the mistake in the plaintiff's deed ; and 2d. To avoid the payment of A. J. Hudspeth's note, and pave the way to recover back the fifteen hundred dollars already paid to the plaintiff. They were, therefore, properly made joint defendants to the bill of complaint.

There was no error in dismissing the cross-bills ; no step was taken to make the plaintiff a party to them, by publication or otherwise ; no answer was in fact filed, nor were said cross-bills taken as confessed.

They might, for these reasons, be either dismissed, or treated as waived by the defendants. After a careful examination, no reversible error is discovered in the decree of the chancellor, and the same is affirmed at the appellant's costs.

AUTRY *vs.* WALTERS, ADM'R.

[REAL ACTION IN THE NATURE OF EJECTMENT.]

1. *Attachment; when lands as well as personal property, may be sold either by a venditioni exponas or fieri facias.*—Lands levied upon by attachment, after judgment for the plaintiff may, as well as personal goods so levied on, be sold at the election of the plaintiff, by either a *venditioni exponas* or the ordinary writ of *feri facias*.

APPEAL from the Circuit Court of Fayette.

Tried before Hon. W. S. MUDD.

This was a real action in nature of ejectment, under the Code, for the recovery of land, brought by appellee against the appellant. The land in question formerly belonged to Rowena McGinnis, and both parties derived title through her.

The appellee, against the objection of appellant, was allowed to prove that on the 8th of January, 1866, an original attachment was duly and regularly issued out of the circuit court of the county, at the suit of John King against said McGinnis, and duly and regularly levied and endorsed and returned; and that the original papers had been stolen from the court-house. The appellee was then allowed to offer in evidence, against the objection of the appellant, the return on said attachment, which was as follows:

“Received in office, 8th of January, 1866.

T. D. ENNIS, Sh'ff.

“For want of goods or chattles, I levy this attachment on the following lands, [describing those sued for in the present action,] as the property of Rowena McGinnis; this 8th day of January, 1866.

T. D. ENNIS, Sh'ff.”

The appellee then proved from the records of the circuit court, that the plaintiff in the attachment suit duly recovered judgment against said McGinnis, and that upon this judgment a *venditioni exponas* was duly issued on the 19th

of April, 1868, commanding the sheriff to expose for sale the lands levied on to satisfy said judgment; that in accordance with this order, the sheriff duly advertised said lands and sold the same according to law; that at this sale appellee became the purchaser and received the sheriff's deed to the lands on the 5th of July, 1869. The deed and all the proceedings, anterior thereto, were in due form, and no objection was taken to them on account of form, but the defendant objected to their admission as evidence on the ground that the deed, &c., were illegal evidence. The court overruled the objection and permitted the deed, &c., to go to the jury as evidence and defendant excepted.

The defendant claimed under a deed from said McGinnis, dated 27th March, 1866, whereby, in consideration of \$1000, she conveyed the lands in controversy to defendant. This deed had been "duly recorded."

The jury found a verdict in favor of the plaintiff (appellee), and hence this appeal.

Among other errors assigned is the admission of the sheriff's deed, &c., as shown in the bill of exceptions.

WM. R. SMITH, for appellant.

E. P. JONES and A. J. WALKER, *contra*.—We have been able to find only one section of the Revised Code directly authorizing the issue of writs of *venditioni exponas* which applies to "goods" levied on by virtue of a *fiery facias*, and remaining unsold. But the power to issue an order of sale, or *venditioni exponas* to make the attachment, and judgment in pursuance of it effective, is deducible from several sections of the Code. 1. Attachments may be levied on real estate.—Revised Code, § 2943. 2. The levy of an attachment creates a lien from the levy.—Revised Code, § 2955. 3. Perishable property may be sold by order of court before judgment, and under some circumstances by sheriff without an order.—Rev. Code, §§ 2956, 2957. 4th. The sheriff is allowed fees for selling property attached, the same as for selling on *fiery facias*, thus implying that property attached may be sold otherwise than under a *fiery*

Astry v. Walters, Adm'r.

facias.—Rev. Code, § 3518. 5th. The form of the attachment does not provide that the property attached should be held subject to a future writ of *feri facias*, but to further proceedings to be had “at the court-house”—thus implying that the property should be held subject to be rendered.—Rev. Code, § 2939.

A writ of *feri facias* may be a *permissible*, but not an *appropriate*, mode of enforcing the specific lien acquired by the levy of an attachment. A *feri facias* issues against the goods and chattels, lands and tenements generally of the defendants. Its office is not to enforce a specific lien. The condition of property attachment is strictly analagous to that of property levied on by virtue of a *feri facias* and remaining unsold. A *venditioni exponas* was at common law the appropriate remedy in the latter case.—2 Tidds. Practice, pp. 1020, 1021, 1068.

The question as to the right to sell goods attached under a *venditioni exponas*, is settled in this State in the case of *Gary v. Hines*, 8 Ala. 837. When the decision in *Gary v. Hines*, *supra*, was made, there was no statute authorizing the issue of *venditioni exponas* to sell property attached, any more than there is now.—Clay’s Digest, 62, § 35. This section expressly gives a *feri facias*. Nevertheless, the supreme court held, that a sale might be made under a *venditioni exponas*. This decision is a rule of property. It has been generally acted on. It may have been the guide in the issue of the *venditioni exponas* in this case. Such decisions should be adhered to.

The following authorities are decisive of the question in this case: *Smith ex dem. v. Spencer*, 4 Iredell’s Law, 256; *Farmer’s Bank v. Thomas Wallace*, 4 Harrington (Delaware R.) 370; *Carson Low v. Doe ex dem. Huntington* 5, *Smedes & Marshall* (Miss.) 111; 5 Howard’s Miss. 548.

PECK, C. J.—The only question made on this record is, can land levied upon by an attachment, after judgment for the plaintiff, be sold under a *venditioni exponas*?

We have no hesitation in answering this question in the affirmative. Until the year 1837, lands were not subject

to be levied upon by an attachment. By an act of that year, (Clay's Dig. p. 60, § 29,) it is provided that "when-ever an original attachment shall be issued for, or upon any of the causes now provided by law, it shall be lawful to levy the same upon any land belonging to the defendant in such attachment, by the officer whose duty it may be to levy or execute the same, in the same manner that attachments are, or may be by law authorized to be levied on goods, chattels, or effects."

In the case of *Gary v. Hines*, 8 Ala. 837, it is decided that "where a judgment is obtained in a suit commenced by attachment, the plaintiff may, at his election, take out a *venditioni exponas* for the sale of the property attached, or he may sue out an ordinary *feri facias*."

In that case, it is true, the attachment was levied on personal property, and not lands, but the language of the court is broad enough to embrace lands so levied upon, as well as personal property.

Now, as is often the case, suppose lands and personal property be levied upon by the same attachment, after judgment, can there be any good reason why both may not be sold under the same writ? We are unable to see any.

If, in such a case, the property levied upon is sufficient to satisfy the judgment, so as to render a resort to other property unnecessary, the appropriate writ would seem to be a *venditioni exponas* to sell the property on which the plaintiff acquired a lien by the levy of his attachment, rather than the ordinary *feri facias*.

For these reasons, it seems to us, the court below decided rightly in overruling the appellant's objections to the admissibility of the *venditioni exponas* and the sheriff's deed for the lands sold under that writ.

Let the judgment be affirmed at appellant's cost.

WHITLEY vs. MOSELEY.

[ACTION ON VERBAL AGREEMENT—PROMISSORY NOTES.]

1. *Charge to jury ; what erroneous.*—W., representing to the wife of M. that he had agreed with her husband for the purchase of his land, received from her the possession, and gave her, as part of the consideration, certain notes of her husband, founded upon valuable consideration, and the value of the rent of another place to which she removed, all of which he procured with Confederate currency. W., repudiating the transaction as a sale of his land, but acknowledging the benefit that accrued to him by having his notes taken up, adjusted the matter with W., by agreeing to pay him a specified sum in Confederate currency, less the rent of his own land during W.'s possession of it,—*Held*, that, in a suit by W. on this agreement, a charge that the jury must find for the defendant, was erroneous.
2. *Same ; measure of recovery in such case.*—The measure of recovery in such a case is the value, at the time of the contract, the true and legal consideration for which the specified sum in Confederate currency was agreed to be paid, less the rent due the defendant.

APPEAL from the Circuit Court of Montgomery.

Tried before Hon. JAMES Q. SMITH.

Whitley induced Moseley's wife, who, as he knew, had no authority in the premises, to agree to sell Moseley's lands to him, by informing her that he had made the contract with her husband, who was then absent in the army. According to Mrs. Moseley's requirements, Whitley paid for the lands, partly with two outstanding notes due by her husband to one Brown and to one McDaniel, and the remainder of the purchase-money in Confederate money, and the rent of another place, to which she removed on giving Moseley possession of her husband's lands. This occurred in 1864, and shortly after this, in October, 1864, Moseley returned home, repudiated the sale, and returned the money paid by Whitley, but acknowledging the benefit received by the taking up of his notes, which Whitley had bought with Confederate money, agreed to pay Whitley

\$1437, which was to be reduced by the rent of his place while in Whitley's possession, the amount of the rent to be afterwards agreed on between them. For this indebtedness, Moseley gave Whitley a due bill, which did not state what kind of money it was to be paid in, but there was proof that it was understood and agreed between the parties that the due bill was to be discharged by payment of Confederate money.

The complaint contained two counts. The first declared upon the two promissory notes made by Moseley in favor of Brown and McDaniel, and sets forth specially the purchase of the land, the delivery of the notes to Moseley, Moseley's refusal to sanction the purchase, or to deliver up the notes, and alleges that these notes are now the property of the plaintiff. To this count the court sustained a demurrer, but the grounds of the demurrer do not appear in the record.

The second count was based upon the settlement by Moseley with Whitley, and specially sets forth all the facts as above stated.

This was all the evidence, and the court, at the request of the defendant, charged the jury that if they believed the evidence, they must find for the defendant.

The charge given, and sustaining the demurrer to the first count of the complaint, are now assigned as error.

WATTS & TROY, for appellant.—1. The first count in the complaint stated a good cause of action, and the demurrer ought not to have been sustained.

If it be said that it shows a parol contract for the sale of the land, this was no reason to make the count bad, for it is shown that the contract was rescinded, and the defendant became liable to pay the amount of the notes made by himself, received under the rescinded contract, he having retained them, and refused to deliver them to plaintiff, who is alleged to be the owner thereof.

2. The charge given by the court, that the plaintiff could not recover on the evidence, which is all set out in this bill of exceptions, was clearly erroneous. It is presumed that

the judge gave it on the supposition that a contract payable in Confederate treasury notes could not be enforced. But in this the court mistook the law, as is now well settled by this court.

Even if the agreement shown in the bill of exceptions to pay the balance, \$1437, in Confederate money, was illegal and void, still the plaintiff was entitled to recover the amount of the notes executed by the defendant to McDaniel and Brown, which had become the property of plaintiff, and the balance of the rent of the land obtained from Goldsmith, and the amount paid Dr. Sale for defendant.

RICE, SEMPLE & GOLDTHWAITE, *contra*.

B. F. SAFFOLD, J.—The grounds of the demurrer which was sustained to the first count in the complaint, are not stated in the transcript.

The case made by the bill of exceptions is briefly as follows: Whitley, without any authority to do so, represented to Moseley's wife that he had contracted with her husband to buy his land at a given price. Under the influence of this statement, Mrs. Moseley gave up to him the possession of the land, and received from him, as the consideration, certain notes made by Moseley, in favor of other parties, some Confederate money, the value of the rent of another place to which she removed, &c. When Moseley, who was in the Confederate army at the time of this transaction, returned home, he repudiated the contract entered into with his wife. But admitting that he had derived benefit from the payment of his debts by Whitley, he made a settlement or adjustment of matters between them, by which he agreed to pay Whitley an ascertained amount of money, in Confederate currency, to be reduced by the rent of his own land in Whitley's possession.

Upon this contract, made by Moseley after a full understanding of the whole matter, and which seems to be explicitly stated in the special count, Whitley is entitled to recover the amount he is "legally, justly and equitably entitled to receive, according to the contract, by the judg-

Voss & Co. v. Robertson, Brown & Co.

ment of the court."—Ord. 26, § 3, Conv. 1865. The measure of recovery is the value, at the time of the contract, of the true and legal consideration for which the specified sum in Confederate currency was agreed to be paid, less the rent due to the defendant. In determining this amount, the court may be sufficiently guided by the principles declared in the cases of *Herbert & Gessler v. Easton*, 43 Ala., and *Bloch v. McNeil*, at the present term.

The judgment is reversed and the cause remanded.

VOSS & CO. vs. ROBERTSON, BROWN & CO.

[TRIAL OF RIGHT OF PROPERTY, &C.]

1. *Agent, authority to sell; what does not authorize.*—An authority to an agent to sell goods, does not authorize him to pledge them.
2. *Bill of lading; how far negotiable.*—A bill of lading is only *quasi* negotiable, and is not subject to the rule that the owner of negotiable paper can not protect himself against a *bona fide* holder for valuable consideration, on the ground that he did not authorize it to be used except for some particular purpose.
3. *Liens; how lost.*—Liens at law exist only in cases where the party entitled to them has the possession of the goods. If the possession be parted with, the lien is gone after it attaches.

APPEAL from the Circuit Court of Mobile.

Tried before Hon. JOHN ELLIOTT.

On the 18th day of March, 1868, one J. A. Powell, being indebted to Robertson, Brown & Co., the appellees, in the sum of \$370 72-100, they, on that day, sued out an attachment against him, which was immediately levied upon twelve bales of cotton, which were delivered to appellants upon making the statutory affidavit that they had a just claim thereto, and executing the proper bond, &c.

Powell having failed to appear at the trial term, judg-

ment by default was rendered against him, and trial was had of the right of property in the cotton levied on, under the claim filed by the appellants.

On the trial, there was evidence tending to show that Powell was the owner of the cotton levied on and claimed by the appellants, who set up title in themselves by reason of the transactions hereinafter stated :

On the 11th day of March, 1868 G. W. Hayes delivered to the Selma & Meridian Railroad Company thirteen bales of cotton, to be shipped to A. A. Voss & Co., (of which the twelve bales of cotton levied on were part,) and took the bill of lading therefor in his own name. On the 16th day of March, Hayes delivered this bill of lading to A. A. Voss & Co., the appellants, grocery merchants in Mobile, and who were in the habit of receiving cotton "for sale in the usual way," and thereupon they advanced said Hayes on the cotton \$1,000, which they borrowed from Murphy & Co., to whom the cotton was delivered, to be sold by them as usual among cotton factors and commission merchants. On the same day, Hayes drew a draft on appellants in favor of one Johnson for whatever balance might result from the sale of the cotton, with the understanding and agreement that this draft was to be placed to the credit of Johnson on an account due by him to Voss & Co., and this was to close up the whole of the transaction between Hayes and Voss & Co. On the next day, this last "draft was shown to Johnson, who had come to the store of said Voss & Co., with said Powell, and Johnson remarked that it was all right."

In May or June, 1868, the cotton was sold, and the amount arising therefrom, after paying the \$1,000 advance and expenses, was placed to the credit of said Johnson ; and before this sale, but some time after the advance was made, Powell notified appellants of his claim to the cotton.

The evidence was conflicting as to whether or no Hayes had express authority from Powell to sell the cotton ; but the evidence was positive that Voss & Co. had no notice whatever but that Hayes was the owner of the cotton, until after the \$1,000 had been advanced and the draft

drawn by Hayes against the cotton for the balance of the proceeds in favor of Johnson, and that they made this advance *bona fide* in the way usual among cotton factors and merchants, on the faith of said cotton.

This was in substance all the evidence, and thereupon the court charged the jury that "although they might believe from the evidence that Powell authorized said Hayes to ship and sell his cotton, still this would not authorize Hayes to pledge the cotton for his own debt, or for any advance made to him, Hayes; that if it was not sold to claimants, but left with them to be sold, and although claimants may have advanced \$1,000 to Hayes for himself, still, claimants could not be protected against the plaintiff, Powell." To this charge appellants excepted.

The appellants then asked the court to charge the jury that "if the claimants had a lien on said cotton for such advances, and delivered said cotton to Murphy & Co., to be held by said Murphy & Co. as their bailees or agents, then their lien continued on said cotton in said Murphy & Co.'s possession." This charge the court gave with the qualification, that "if the jury should believe from the evidence that claimants parted with the possession of said cotton, and had no longer any control over it, and the levy of the attachment was made before they regained the same, said lien was lost, and could not prevail against the plaintiff." To this charge, as qualified, claimants (appellants) excepted.

The last charge given by the court, at the instance of the plaintiffs, was as follows: "If the jury believe from the evidence that Hayes was Powell's agent, and that he had authority to take the advance from Voss & Co., and thus created a lien on the cotton in their favor to the amount of the \$1,000 advance, still, the balance of the proceeds of the cotton was subject to plaintiff's attachment, subject to the lien of Voss & Co., and the attachment being levied before the cotton was sold and the proceeds placed to the credit of Johnson on authority [of the order] drawn by Hayes, said attachment stopped said balance in the hands of Voss & Co. as Powell's property, and

the jury must find the balance of the proceeds of such cotton, after satisfying the debt due Voss & Co., to be the property of Powell, and liable to the satisfaction of the debt due by him to plaintiffs." To this charge the appellants excepted.

There was a verdict for the plaintiffs, (the appellees,) and hence this appeal. The charges given by the court, and the qualification of the charge asked, are now assigned for error.

WM. BOYLES, and MORGAN, BRAGG & THORINGTON, for appellants.

R. H. SMITH, *contra*.

(No briefs came into Reporter's hands.)

B. F. SAFFOLD, J.—A line of separation between the respective rights of a principal, and of a third party, to protection against each other on account of the tort of an agent, is not easily defined. One who has clothed his agent with all the apparent muniments of an absolute title, and authorized him to dispose of the property, as sole owner, ought rather to suffer than one whom his conduct has enabled his agent to impose on. On the other hand, immunity to the third person on account of innocence of intention merely, would destroy all rights of property. One who deals with another respecting property, must be charged with the responsibility of that other's right or authority to dispose of it as he claims to do.

An agent to sell has no authority to pledge the goods of his principal, although the property be entrusted to him, and the pledgee be ignorant that he is an agent.—Story on Agency, §§ 224, 78, 437; *Bott v. McCoy & Johnson*, 20 Ala. 578. A bill of lading is rather *quasi* negotiable than actually so, and consequently is not subject to the rule that the owner of negotiable paper can not protect himself against a *bona fide* holder for valuable consideration, on the ground that he did not authorize it to be used except

for some particular purpose.—Pars. on Cont. p. 600, 601, 239; 6 East, 17, 538.

The charges given by the court are in conformity with the above principles. The qualification to the charge asked by the claimants asserted a correct proposition. Liens at law exist only in cases where the party entitled to them has the possession of the goods; and if he once part with the possession after the lien attaches, the lien is gone. *Lickbarron v. Mason*, 6 East, 21–27. It is unnecessary to consider the last charge given at the request of the plaintiffs. The verdict was not affected by it.

The judgment is affirmed.

[NOTE BY REPORTER.—At a subsequent day of the term the appellant's counsel applied for a rehearing, or at least a modification of the opinion, and filed in support thereof the following argument]:

The proposition is certainly true, that as between the principal and the agent, or as between the agent and a third person, dealing with the agent with notice of his agency, a power to sell will not authorize a pledge. But this is not a case arising between the principal and the agent, nor is it a case arising between the principal and a third party, who has dealt with the agent with notice of the agency. Voss & Co. had no notice that Hayes was an agent, nor was there any circumstance from which they could infer that fact. The bill of lading was in the name of Hayes; the cotton was under his control and in his possession; everything went to show that he was the owner of it; and Voss & Co. dealt with him as the owner of the cotton. Therefore, it is respectfully submitted, that the charge of the court below was erroneous. As between Voss & Co., and the plaintiffs and Powell, the facts do not show that the question of Hayes' agency could be raised to the prejudice of Voss & Co. and to invalidate a transaction they had effected with Hayes in good faith on their part and without notice of any agency. "As a general rule, he who employs an agent shall lose by his fraudulent, negligent or illegal

act, rather than an innocent person. It is a universal rule, based on principles of policy, propriety and justice, that if a principal puts his agent in a condition to impose on innocent third persons, by apparently pursuing his authority, he shall be bound by his acts."—*Dunning & Smith v. Roberts*, 35 Barb. p. 463; 33 Barb. pp. 17, 18, and cases there cited. The real question in this case, as we respectfully submit, is not what power was intended to be given to the agent, but what power a third person who dealt with the agent had a right to infer he possessed, from his own acts and those of his principal.—1 Peters (S. C.) Rep. pp. 444, 445; 8 How. (U. S.) Rep. p. 384; *Copeland v. Touchstone*, 16 Ala. pp. 333, 334, and authorities there cited.

A factor is an agent.—1 Bouvier, p. 306. By the bill of lading, the cotton was consigned to appellants. The sale by Murphy & Co. is the same in principle as if it had been made by appellants. It is submitted that the cotton was not pledged to appellants, but that the money advanced was a sale *pro tanto* to Voss & Co., and that, as to the extent of this amount advanced, Voss & Co. stood in the attitude of *bona fide* purchasers. In support of this proposition, we particularly refer to the case of *Hall v. Hinks et al.*, 21 Maryland Reports, pp. 416, 417, and authorities there cited.

A factor, who is nothing but an agent, deals with goods entrusted to his principal as if they were his own, and all persons to whom he disposes of them may set off or retain the amount of the factor's indebtedness when an action is brought for the price, either by the factor or his principal. 13 Johnson, p. 9; Paley on Agency, 326.

The effect of a consignment of goods, generally, is to vest the property in the consignees.—17 Howard, 107. If Powell consented that Hayes should ship said cotton to Mobile as his own, and in his own name, consigned by bill of lading to Voss & Co., and the latter in good faith made advances on it to Hayes, then it is submitted that Powell is estopped by his own act; and if Powell is estopped, it would follow that his creditors would be.

In *Gardner & Sayre v. Allen's Executors*, 6 Ala. p. 187,

this court say—"Where one purchases goods of a factor, under the belief, authorized by the facts of the case, *that the latter was the real owner*, he may set off a debt due him from the factor, to an action for the purchase-money, brought either by the factor or his principal."—See, also, Story on Agency, § 420, and authorities there cited.

Upon the hypothesis, warranted by the proof, that Powell authorized Hayes to ship the cotton to Voss & Co., and take a bill of lading in his own name, then Powell concealed his name. This was a fraud. In such a case, the purchaser of goods, before they are paid for, may, in an action by the principal, set off a debt due him from the factor, upon the ground that the parties by their conduct having contracted with him in that character, they can not recover against him without allowing the same advantages and equities in his defense that he would have had against the agent. In these cases it is held that it makes no difference whether the sale by the agent is under a *del credere* commission or not.—10 Wendell, p. 495, and the cases there cited.

If the view that we take of this case is correct, then, it is respectfully submitted, with great deference, that the case of *Bott v. McCoy & Johnson*, 20 Ala. p. 383, has no application to the real point involved in this case. That case only asserts the principle that the factor is not authorized to pledge the goods of his principal for his own use. But the point we rely upon in this case is that Powell permitted Hayes to ship the cotton to Voss & Co., who were named in the bill of lading as consignees, upon their paying freight, &c., this bill of lading being taken in the name of Hayes, thereby enabling Hayes to perpetrate a fraud upon Voss & Co., in obtaining from them \$1,000 as an advance upon said cotton, and dispose of it as his (Hayes') own property, and that by this act Powell is estopped from asserting any claim to the proceeds of said cotton against parties who stand in the attitude of purchasers for value, in good faith, without notice, and that Powell being estopped, his creditors, the appellees, are also estopped.

For the same reason we respectfully submit that the principle asserted in *McCombie v. Davies*, 6 East, pp. 540, 541, can have no controlling influence in this case. In *McCombie v. Davies*, there were no facts tending to show that McCombie, as principal, had conferred any authority upon his agent, Coddan, which authorized the latter to pledge the tobacco to Davies. Here the proof shows that such authority was given by Powell to Hayes to deal with the property as his own, and this is shown by the fact that Hayes had taken the bill of lading for the cotton in his own name. Powell having put it in the power of Hayes to perpetrate a fraud upon appellants, in such case the rule is that when one of two innocent persons must suffer by the fraud of a third, the loss must fall upon him who is in fault. 6 Denio, p. 232 ; 4 Denio, 327 ; Story on Sales, § 313.

Upon the face of the proceeding in the transaction with Voss & Co., Hayes was not an agent, but a principal ; there was nothing to show that Hayes was not the owner of the cotton ; but, on the contrary, every fact and circumstance went to show that he was the owner of the cotton, for it was shipped in his name in the bill of lading, and he had the bill of lading for it.

On the foregoing grounds your petitioners respectfully pray for a re-hearing in said cause, and, the premises considered, that the said judgment rendered at the present term of this honorable court may be set aside and vacated, or that the same may be modified, so far as the \$1,000 advanced by Voss & Co. is concerned.

The following response was made by—

SAFFOLD, J.—The declaration which the appellant desires the court to make, is, that the cotton receipt given by the Selma and Meridian Railroad Company to Hayes for thirteen bales of cotton, to be carried to Mobile and delivered to Voss & Co., as consignees, was such evidence of title in Hayes as justified Voss & Co. in dealing with him as the owner of the cotton. This could only be so in case the cotton receipt was a negotiable instrument. It is not

so recognized by the commercial law, and we are not authorized to confer upon it that authority.

A re-hearing is denied.

PETTY vs. BRITT'S LEGATEES.

[APPEAL FROM ORDER OF PROBATE COURT, ANNULING AND DECLARING VOID THE FINAL SETTLEMENT OF AN ADMINISTRATOR.]

1. *Decree of final settlement; when may be annulled.*—The court of probate may set aside a judgment or decree made therein on the final settlement of an administration, where it appears from the record that the court acted without jurisdiction of the parties or the subject matter.
2. *Probate court, final settlement in; what necessary when minors are interested.*—The court of probate can not proceed in the final settlement of an administration where the record shows that there are minor distributees without appointing a guardian *ad litem* to represent the minors and his acceptance of such appointment, if there is no general guardian.
3. *Probate court; decree of, what void.*—A decree of the court of probate on the final settlement of an estate by an administrator, when there are minors, who are unrepresented by a guardian or guardian *ad litem*, will be set aside as void on motion of the distributees.

APPEAL from the Probate Court of Barbour.

Tried before Hon. H. C. RUSSELL.

This was a petition by Enoch Mills, the administrator *de bonis non*, with the will annexed of Matthew Britt, deceased, in which Virginia Mills, wife of said Enoch Mills, by him as her next friend, and Matthew, Sarah, Moses, and John Britt, legatees, &c., joined, alleging that the final settlement of said estate, by Benjamin F. Petty, administrator of said estate, made on 3d December, 1866, is null and void, and not binding on them, and praying that said Petty be required to make a final settlement of his accounts, &c., and for such other and further relief as to the court might seem proper."

Petty v. Britt's Legatees.

The petition alleges that several of petitioners were minors at the time of making said final settlement, and that although the record of the settlement shows that one Macon was appointed guardian *ad litem* of the minor heirs, that no acceptance of said appointment is any where apparent in said record ; and there was no list of legatees to be found attached to said final settlement, showing which of the legatees of said estate were minors.

On the hearing the petitioners proved they were the legatees, &c., and offered in evidence the orders of the probate court, showing the appointment, &c., of said Petty, and the record of the final settlement, from which it appears that the allegations of the petition were true. As to the allegation that certain of the petitioners were minors, the record was wholly silent, except where it referred to the appointment of the guardian *ad litem*. The order of final settlement, so far as it refers to the guardian *ad litem*, is as follows : "And it also appearing that Junius M. Macon has heretofore been duly appointed guardian *ad litem* of the minor heirs of said estate, and no exceptions having been made, &c.," it is ordered that the account be allowed as stated, &c.

It did not appear from these records that notice of said settlement had been given for three successive weeks, as required by law, but only for three weeks, without specifying that they were successive weeks.

The contestant offered to prove that at the time of the final settlement the only property belonging to the estate was a residence and plantation then occupied by the petitioners ; that the administrator *de bonis non* was the husband of Virginia, one of the petitioners and their business agent, and that he occupied the plantation with them and managed it ; that Mills desired to have the administration of the estate, and that the final settlement made by him was the result of a compromise and agreement between Mills and contestant, whereby the latter resigned, and the former was appointed ; that of this agreement and settlement the petitioners had notice, and this was the rea-

son why the names of the legatees were not specifically set out, &c.

On the objection of the petitioner, this evidence was rejected by the court and the contestant excepted. It was admitted that at the date of the final settlement three of the legatees were minors; that three of them were minors when this petition was filed, and one of them was still a minor.

The bill of exceptions states that at this stage of the hearing of the petition it was discovered that the appointment of Mills, as administrator, was premature, it having been made before contestant resigned, and the petition was amended by striking out the words "Enoch Mills, as administrator *de bonis non* with the will annexed of Matthew Britt, deceased," and the petition then stood in the name of Virginia Mills, wife of Enoch Mills, by him as her next friend, Matthew, Sarah, Moses, and John Britt, legatees. The contestant demurred to the amended petition on the following grounds: That the one petitioner, who was a minor, was not represented by next friend, and, secondly, that no personal representative of the estate was made party to the proceeding.

The court overruled the demurrer, annulled and set aside said final settlement, and taxed the contestant with the costs; and he appealed to this court, and here assigns as error—

1. The refusal to receive the evidence offered by contestant.
2. Overruling the demurrer.
3. The decree rendered.

WILLIAMS & BROTHER, and JOHN A. FOSTER, *contra*.—The evidence offered by appellant should have been admitted. It showed that some of the petitioners knew of and virtually consented to the final settlement. This would bind those who were of age. The demurrer to the petition should have been sustained. The petition does not seek merely to have a void decree set aside, but to have another final settlement made. These peti-

tioners could not be parties to a decree on settlement by the administrator, except on the final winding up of the estate. This estate was not to be finally disposed of by appellant, but merely to pass into the hands of his successor. Nor could a decree be rendered in favor of any other than such successor.—Rev. Code, §§ 2233, 2237, 2166, 2167. "Under the Code, it is not only the privilege of the administrator-in-chief to pay over to his successor the assets and effects of the estate in his hands, not fully administered, but it is his duty; and, if he fail to do so, it is both the privilege and the duty of the latter to compel him." *Whitsworth's Distributees v. Oliver et al.* 39 Ala. 286.

One of the petitioners was a minor, but was not represented by next friend. This was error too manifest to need or require argument to show it.—*Cook v. Adams*, 27th Ala. p. 291.

The decree rendered by the court below recites that the prayer of the petitioners is granted, and that the decree rendered on appellant's final settlement is set aside, but goes no further. The petitioners prayed for more than the decree contains, and for that which could be done in favor of a succeeding representative of the estate alone. *Whitsworth's Distributee v. Oliver et al.* 39 Ala. p. 286.

STONE, CLOPTON & CLANTON, with whom is D. M. SEALS, *contra*.—1. This was, in effect, a motion to declare what purports to be a final settlement, void, and to set it aside and to compel the administration to make a final settlement. Although it was commenced by petition, no petition was necessary.—*Ketchum and Wife v. Dennis*, 41 Ala. 185. A motion is the proper remedy to declare a decree void.

Hence, overruling the demurrer to the petition, if it be error, was error without injury; for, if the demurrer had been sustained, the parties being present and before the court, the motion ought still to have been heard. The parties applying could have obtained the same relief, and the parties defending have shown the same defenses without the petition as with it.

But even if a petition were necessary, there was no error

in overruling the demurrer. The demurrer was to the entire petition ; and there were parties who were not minors. It is not a case in which all the parties must recover, or none can ; and the first cause of demurrer is to the effect that the entire petition should be dismissed, and not that it should be dismissed merely as to those who were minors.

The second cause of demurrer is, also, untenable. Prior to the act of 1846, the distributees alone could maintain an action against an administrator-in-chief after his removal from office. His successor could not.—*Hanna v. Price*, 23 Ala. 826 ; *Hayes v. Cockrell*, 41 Ala. 79 ; *Gould v. Hayes*, 19 Ala. 438. Now, under the statutes, his successor can maintain an action against him. When the resigned administrator makes a final settlement, then the decree must be rendered in favor of the succeeding administrator, or in favor of the distributees as on a final settlement, if the estate can be finally settled.—Rev. Code § 2237. But a succeeding administrator is not a necessary party to a petition or a motion of this kind in this case, and may or may not be a party upon a final settlement, as the condition of the estate may require. Certainly, he is not a necessary party before then.

2. The testimony offered should have been excluded, as it did not bind or estop the minors, and did not tend to show that the settlement was valid, or to throw any light upon the matter in issue.

3. The final settlement was void ; there was no acceptance by the guardian *ad litem* apparent on the record, and no appearance by him, or denial of the correctness of the account, and should have been annulled by the court. *Laird, adm'r, v. Reese*, 43 Ala. ; *Searcey v. Holmes, adm'r*, 43 Ala.

PETERS, J.—A judgment, without notice to the parties interested in the subject of litigation, is not conclusive as to them, but it is void.—Minor R. 14, 23. In the final settlement of the administration of an estate, the minors are brought into court by a guardian *ad litem*, if they have no regular guardian. Here the guardian did not accept his

McPeters, Surviving Partner, v. Phillips.

appointment, and did not appear for the minors. They were, therefore, not in court at the settlement. Such settlement has heretofore been denounced as void:—*Laird, adm'r, v. Reese*, 43 Ala. 143; *Searcey v. Holmes et al., adm'rs*, 43 Ala. 608.

The overruling the demurrer to the petition, for the causes shown in the record, was not error. In such a case, the petition could not be regarded as more than a notice to bring the administrator into court to hear the motion, and the motion must be founded upon the facts shown in the record. If these were sufficient, the court could entertain the application for relief.—*Johnson v. Johnson, adm'r*, 40 Ala. 247, and cases there cited. There was, then, no error in rejecting the evidence of facts not apparent upon the record. The record must show that the court had jurisdiction, both of the subject-matter and the parties in such a case, else its judgment is void.

The judgment of the court below is therefore affirmed, with costs.

McPETERS, SURVIVING PARTNER, vs. PHILLIPS.

[TROVER FOR CONVERSION OF PROMISSORY NOTE.]

1. *Conversion of promissory note; measure of damages.*—In trover for a promissory note, the measure of damages is *prima facie*, the value on its face. But the insolvency of the parties liable thereon may be shown in mitigation of damages.
2. *Same; insolvency, how may be proved.*—In such an action the insolvency of the maker may be shown by parol evidence.

APPEAL from the Circuit Court of Lauderdale.

Tried before Hon. JAMES S. CLARK.

The appellant being sued in trover for the conversion of a promissory note made by one Gillis, offered to prove by

McPeters, Surviving Partner, v. Phillips.

several witnesses that the maker, said Gillis, was insolvent from the time appellant received the note until said Gillis died, and that said Gillis' estate was insolvent. He also offered the records of the probate court of the county, in which the administration of the estate was being settled, to show that said estate was insolvent. To the introduction of the witnesses and the record of the probate court, appellee objected and the court sustained the objection, &c., and appellant excepted. There was a verdict and judgment against appellant, and hence this appeal.

R. O. PICKETT, for appellant.

E. A. O'NEAL, *contra*.

B. F. SAFFOLD, J.—It is stated once in the bill of exceptions that the witnesses were offered to prove that the maker of the note was notoriously insolvent, but in two other instances simply that he was insolvent. The obvious meaning of the bill of exceptions is, that the defendant offered the witnesses to prove the value of the note. Insolvency is said to be a conclusion of law. It can not be proved by reputation, but the reputation of facts, or circumstances, from which such a conclusion may properly be drawn is legitimate evidence.—*Lawson v. O'Rear*, 7 Ala. 784. The line of distinction is finely drawn, and would not probably be observed in a mere proposal to introduce witnesses, which was refused. We think it was meant by "notoriously insolvent," that the maker of the note was so utterly insolvent that there could be no question about it among those who knew any thing about his pecuniary condition.

In trover for a bill, or note, or other chose in action, the measure of damages is *prima facie* the value on its face. But the insolvency of the party liable thereon, or any other fact tending directly to reduce its value, may be shown in mitigation of damages.—3 Pars. on Con. 195-6; 2 Greenl. Ev. 649; *Bk. Mobile v. Marston*, 7 Ala. 108; *Walker v. Forbes*, 25 Ala. 139.

The inventory and appraisement of Gillis' estate were

Lillensteine v. The State.

not of as high a grade of testimony as the evidence of the administrator and the appraisers.

The judgment is reversed and the cause remanded.

LILLENSTEINE *vs.* THE STATE.

[INDICTMENT FOR RETAILING LIQUORS.]

1. *Wholesale liquor dealer; when becomes retailer.*—Under the revenue law of 1867, a licensed wholesale dealer in spirituous liquors, &c., becomes a retail dealer if he sells in less quantities than a quart, or suffers larger quantities sold or disposed of by him, to be drank on his premises.—Section 112, subdivisions 4, 5.
2. *Revised Code, section 3618 of; what not repealed by.*—Section 3618 of the Revised Code of Alabama is not repealed by the revenue act of 1868.

APPEAL from Circuit Court of Barbour.

Tried before Hon. J. McCaleb Wiley.

The facts appear in the opinion.

WILLIAMS & BROTHER, and SEALS & WOOD, for appellant. The indictment contains three counts. In the first and second counts the form in the Code is followed, with an averment in the second that the liquor was sold in quantities less than a quart. The third count is drawn with reference to the revenue law of 1868, and attempts to charge an offense under that law.

The questions presented by the record are—1st. Can a conviction be had under section 3618 of the Revised Code, for retailing without license? 2d. Is the third count sufficient under the revenue law of 1868?

1. In *Ex parte Burnett*, (30 Ala.) *per curiam*, on the motion for re-hearing, it is said by this court, before the State can complain that a supposed offender has retailed without a license, some legal mode must be provided by which a

retailer may obtain a license. It will not be denied that sections 437 and 1237, and those following, of the Revised Code upon the subject of retailing, requiring and providing the mode of obtaining a license to retail spirituous liquors, have been repealed by the revenue law of 1868. Hence, whatever may be the effect of the revenue law of 1868 upon section 3618 of the Revised Code, there is no law in the Revised Code providing a legal mode for a party to obtain a license to sell liquor. Can the law in the Code against retailing punish a party for retailing without a license when the Code fails to provide for a license?

The statutes providing for a license, and the penalty for selling without a license, were found in the same chapter in the Code of 1852. When the Penal Code of 1866 was compiled, the penal section was carried into the Penal Code, and from the Penal Code it was carried into the penal part of the Revised Code, and thus became separated from the other portion of the law upon the subject of retailing. But it is as much a part and parcel of the law upon the subject of retailing as if it had remained in the same chapter as under the Code of 1852. Does the revenue law of 1868 operate as a repeal of section 3618 of the Revised Code, as well as the other law upon the subject of retailing found therein? We admit that this court, in *Mulvey v. The State*, (43 Ala.) decided that section 136 of the revenue law of 1868 does not expressly repeal section 3618 of the Revised Code. But the point presented in that case was, whether there was a specific repeal. That decision is likely correct upon the precise point presented. But the revenue law of 1868, as to its penalties, conflicts with the Code as much as it does in its taxation and revenue provisions. The latter law is repugnant to the former, both as to penalty and taxation, and whenever this is the case, the former law is as much repealed by implication as if the latter law expressly said so.—See *George v. The State*, 39 Ala. To make the conflict more striking, it is only necessary to observe that a party could be convicted, if indicted *under the Code*, with or without a license under the revenue law of 1868.

2. The third count is not sufficient under the revenue law

of 1868. It fails to aver that the alleged offense was committed after the third Monday in March, 1869.—See section 111 Rev. Law 1868, Acts 1868, p. 330.

Said third count is also deficient in not averring that the defendant engaged in or carried on the business of selling vinous or spirituous liquors, without a license and contrary to law. It only alleges that defendant *sold* without license and contrary to law. It is true, the indictment states that the defendant, “being engaged in the business,” &c., but it does not aver the business which he was being engaged in when he sold the liquor—was engaged in without license or contrary to law; it is only alleged that he *sold* contrary to law.—See *Moore v. The State*, 16 Ala.; *Eubanks v. The State*, 17 Ala.; *Pettibone v. The State*, 19 Ala.; *Johnson v. The State*, 44 Ala.; *Carter v. State*, 44 Ala.

3. If the indictment be held good under the revenue law of 1868, even then the conviction was contrary to law, for the evidence fails to show that the defendant engaged in the business of selling whisky.—See *Moore v. The State*; *Carter v. The State*, and *Johnson v. The State*, *supra*.

JOHN W. A. SANFORD, Attorney-General, *contra*.—1. The indictment is according to the form prescribed by the Revised Code, and charges an offense against the laws of the State. The demurrer to it was, therefore, properly overruled.—Rev. Code, p. 811, (Form No. 30); *ib.* § 3618; Acts of 1868, p. 331.

2. The law requiring persons who desire to carry on the business of retailing liquor to obtain a license for this purpose, clearly points out the mode in which such license can be obtained.—Acts 1868, pp. 329, 330.

Section 136 of the act of 1868, “to establish a revenue law,” does not repeal § 3618 of the Revised Code.—Acts 1868, p. 340; *Mulvey v. The State*, 43 Ala. 316–19; *Campbell v. State*, at present term.

The license obtained by the accused for carrying on the business of a “wholesale dealer in spirituous liquors,” &c., did not authorize him to sell liquor in less quantities than a quart, or to permit the purchaser to drink such liquor on

Boynton v. Nelson.

or about the premises. If the accused did so, he incurred the penalty of retailing spirituous liquors without a license. Acts 1868, p. 332. The charge asked by the appellant was, therefore, properly refused.

B. F. SAFFOLD, J.—The indictment contained three counts, two of which charged the defendant with selling vinous or spirituous liquors without license, in the form prescribed by the Revised Code for the offense described in section 3618. The demurrer to it was properly overruled.

We have decided that section 3618 was not repealed by the revenue act of 1868.—*Mulvey v. The State*, 43 Ala. 316; *Campbell v. The State*, at present term.

The evidence shows that the defendant, having a license as a wholesale dealer in liquors, &c., sold the liquors on some occasions in quantities less than a quart, and on others, that it was drank on his premises. He was therefore subject to be deemed a retail dealer.—Acts 1868, Rev. Law, § 112, subv. 4, 5. The defendant was not entitled to the charge that he could not be convicted under the evidence.

The judgment is affirmed.

BOYNTON vs. NELSON.

[REMOVAL OF EXECUTOR.]

1. *Probate court, order of removing executor ; when void.*—An order of the probate court removing an executor made at a special term to which the cause was not adjourned or appointed, is void.
2. *Same; what order not grantable as of course.*—Such an order is not one which is grantable of course in the contemplation of section 795 of the Rev. Code.
3. *Appeal, right of being lost ; how can not be restored.*—A party who has lost his right of appeal, though without fault or neglect on his part, can not restore it through the mere instrumentality of a motion to set

 Boynton v. Nelson.

aside the judgment complained of which is overruled. His remedy, where he shows a case for relief, is by *certiorari*, the grant of which is discretionary.

CERTIORARI to the Probate Court of Dallas.

On the 15th day of February, 1869, an order was made by the probate court of Dallas, directing a citation to issue to appellant, as the executor of Alanson Saltmarsh, to appear on the 8th day of March and show cause why he should not give an additional bond, &c. The citation was served on the 18th day of February.

On the 8th of March, Boynton was required to give an additional bond, and allowed until the 12th of April to do so. On the 10th of April the record recites—

“This being the day to which was regularly continued the hearing of the cause, it is again continued until the 10th day of May, 1869. On the 10th of May, by agreement, the cause was again continued until the 24th of May, 1869. No other order was taken in the premises until the 17th day of August, 1869, when the following order was made:

“SPECIAL PROBATE COURT, }
August 17th, 1869. }

A. SALTMARSH, dec'd, estate of. } W. N. Boynton, the pres-
In the matter of the removal } ent executor of said estate,
of the executor of said estate. } having been duly and reg-
ularly required by an order of this court, made and entered
of record on the 8th day of March, 1869, to give bond, as
such executor, additional to the bonds which have already
been given by him in that capacity, and the said period of
time so appointed for the said W. N. Boynton to give such
bond having been afterwards extended to the 24th day of
May, 1869, and the said Boynton having failed and
neglected to file such bond, in accordance with the law and
the requirements of said order, it is, therefore, adjudged
and decreed, &c. [Here follows the order removing said
Boynton, &c., and requiring him to file his accounts and
vouchers for a final settlement, &c., within —— days from
the date thereof.]”

The order made on the 8th of March, 1869, requiring the additional bond, does not fix the amount, and recites : "It appearing to the court that said bond is probably not now secured as required by law ; it is, therefore, adjudged that said W. N. Boynton be, and he is hereby required, to give a bond, as such executor, additional to the one heretofore given by him."

On the 18th of August appellee was appointed special administrator of said estate, for the purpose of collecting and preserving the assets, &c. It, also, appears from the record, that the 8th day of February, 1869, had been regularly set for the filing of the accounts for a partial settlement, &c. By agreement the settlement was continued on the 1st of March to the 5th of April, and again continued to the 16th day of May, and afterwards further continued until the 24th of May, 1869, on which last day Boynton filed his accounts and vouchers for settlement, when the 29th day of June was appointed to make such settlement, and notice and publication thereof was ordered accordingly. On the 26th day of June the cause was again continued until the 2d of August, when, by consent, it was again continued until the 17th of August. On the 17th of August, the record recites that the parties not appearing the cause is continued until the 24th of August. The cause was thereafter successively continued until the 13th day of September.

On the 15th of September Boynton filed his petition, under oath, praying, among other things, that the order removing him be annulled and revoked, &c., &c. The hearing was successively continued until the 10th day of November, 1869 ; the petition was heard and dismissed at the costs of the petitioner.

After this, Boynton, upon his affidavit stating these facts, applied to one of the justices of the supreme court, in vacation, for a *certiorari* to bring the cause directly before the supreme court for revision, and for a *supersedas* to suspend further action in the probate court in the matter, until the final determination of the cause in this court. The grounds of this petition were, substantially, that the

order removing petitioner from the executorship was made at a special term to which the cause had not been regularly adjourned, and that the time in which an appeal could be taken had elapsed before he became informed of the order. The prayer for *certiorari* and *supersedeas* was granted. At the January term, 1870, a motion was made to dismiss the writ of *certiorari*, and to quash the *supersedeas*, &c., which motion the court overruled.—See *Ex parte Boynton*, 44 Ala. Rep. p. 261.

ALEXANDER WHITE, for appellant.

JOHN WHITE, *contra*.—The counsel for the appellant contends that the removal of an administrator for failing to give an additional bond, is a special and summary proceeding, and that if the record fails to show that the court had jurisdiction its action in the premises is void, and that the record in this case fails to sustain the order of removal when tested by this rule.

For the sake of the argument only, we may admit the principle contended for, but we deny its application to this case. On the contrary, we maintain that this record not only shows the jurisdictional fact, but every fact which was necessary to sustain the decree rendered.

The power conferred by section 2029, is peculiar and extended. The judge is not allowed to wait as in ordinary cases, till some interested party invokes his action, but he is required to act *mero motu*, and even upon mere impressions made on the mind of the judge from any source whatever. The language is, "when the judge has reason to believe that * * an additional bond should be required," &c. Now, the court in making the order in this case, does not use this exact language, but says what is certainly equivalent to it, and in fact goes beyond it. The record says, "it appearing to the court that the said trust is probably not now secured as required by law." If this be so, has not the judge reason to believe that an additional bond should be required? Is the latter language as strong as that of the record? One is the bare assertion,

that there is reason to believe a certain fact, the other is a statement of the facts on which this opinion is founded, and are amply sufficient to sustain it; for if it appears that the trust is not probably secured as required by law, the judge certainly has reason to believe that an additional bond should be required.

On the day appointed by citation, &c., what is the issue to be tried? The question of the sufficiency of the bond of the administrator. On whom is the burden of proof? Section 2039 says, "If no sufficient cause be shown (by the defendant, of course,) why he should not be required to give an additional bond, the court must make an order to that effect." This statute does not require proof that the bond was taken on insufficient security, or that it had become insufficient, but it demands of the administrator that *he* show that it is sufficient. But the order in this case does not rest upon this, for it recites that the court, *after investigation*, is fully satisfied that the bond is insufficient—thus deciding and setting forth the jurisdictional fact.

It is contended by the appellant that the order of the probate court is void, because it is (as he claims,) not made by the probate court sitting at a regular, adjourned, or special term, but by the judge, acting as such in vacation.

A regular term of the probate court is required to be held on the second Monday in each month, and the judges are authorized to hold special or adjourned terms at any time, whenever necessary for any special purpose.—Rev. Code, § 795.

The order in question was, we think, an order "of course," within the meaning of the last named section, as is fully shown by the argument of our associate counsel.

But if this court should hold that it is necessary to the validity of an order like this, that the judge should be sitting as a court, and holding either a regular, or a special, or adjourned term, and that it must be so certified upon the record, we think the order comes fully up to these requirements.

Boynton v. Nelson.

What is a special term, and how is it to be certified upon the record? I think that a special term is a term held by the judge at a time other than that set for holding the regular term, for a *special purpose*. He is authorized to hold these terms at any time, whenever *necessary*. Of this necessity he is the proper and the only judge, and his decision on the subject is final. But counsel say, that a special term must be *appointed*, set before hand. The statute uses no such terms, but employs the very expressive words, "*hold at any time*." This the judge can do, and he must certify on the record that it is a special term,—which is done in this case. The entry is: "Special Court of Probate, August 17, 1869."

The order in the case of *Moore v. McGuire* was held void on account of the absence of any entry of this kind. After saying that the order was made, "there being no term of the court then being held," the court continue: "He must be sitting as a court, and holding either a special or adjourned term, which must be certified on the record." In that case there could have been no such certificate. In this, there was the only certificate which the probate courts ever make of the holding of either a special or an adjourned term, or regular term.

In *Wightman v. Karsner*, it is not pretended that the record, which contained just what this does as to a special term, was not a sufficient certificate that it was a special term, but the case went off on the ground that the court could hold no special term at all. —20 Ala. 446.

Notice must be given of the holding of a special term of the circuit and chancery courts only because the law authorizing them to be held requires it; but there is no such requisition as to the special terms of the probate court.

But a special term of the court was in fact appointed for the 17th of August, by the order of the 2d of that month continuing Boynton's settlement to that day, and the court had authority to take up this matter, unless it is necessary to the regularity of such a term that it should be appointed in advance for a special purpose, and that nothing else can be disposed of,—which is not the law.

The law takes notice of the fact that the regular terms of the probate courts are held on the second Monday of each month, but the courts can not know when they adjourn; therefore, in the absence of an order showing that a special term was held, his order will be presumed to have been made at the regular August term, for every presumption is indulged in favor of the regularity of what was done. The argument in favor of the administrator is, that this order was not made at any term, regular or special. The 9th of August was the time set for holding the regular term, and it will be presumed to have continued till the 17th of the month, unless the order of the latter date shows that a special term was then held. So that it was a regular term, unless it was a special term; but if it was either, the order was made at a *term*, and is not void because made in vacation. — *Harrison v. Meadows*, 41 Ala. 274, 278-9.

A little reflection will furnish an obvious and conclusive answer to the position that the failure to continue the proceeding to the 17th of August, 1869, was a discontinuance, and deprived the court of its jurisdiction over the case.

The executor had legal notice to appear on the 8th of March and show cause why he should not be required to give an additional bond. This was really the day on which the case was *tried*, and *determined* against him. The issue was, whether he should be required to give an additional bond, or rather, whether his bond was a good one. Of the trial of this issue he had notice, and failed to appear, but the court proceeded (as it had the power to do,) to hear and determine it; and decided it against him. This being done, the judgment necessarily followed that he should give another bond by a certain time. This was in fact a trial and determination of the cause, and the only thing which remained to be done was a compliance on the part of the defendant with the order of the court. This he failed to do, and by such failure subjected himself to removal at any time, and without further notice. He was brought into court by the original notice, and was in law in court, and bound to take notice of all orders made in

the premises. For instance, when the order was made requiring him to give an additional bond within a certain time, he was not present, but it is not pretended that he had any right to notice of that order. Why so? Because he was, in contemplation of law, in court. Just so with the order of removal; if it was otherwise regular, he was bound to take notice of it, and therefore can not complain that he had no notice.—*Harrison v. Meadows*, 41 Ala. 274; *Duffie v. Buchanan*, 8 Ala. 27; *Williamson v. Hill*, 6 Porter, 184.

The case in 41 Ala. is precisely in point; there was no continuance of the proceeding from the 25th of June, 1861, when the order of distribution was made, to the 15th of July, 1861, when a decree was rendered against the administrator; yet the court hold that the administrator must be held to be in court, and to have notice of the decree.—41 Ala. 278.

Besides all this, the executor was in default, if not in contempt, and can not set up his own omission of duty as a reason why the order is not valid.

On being required to give an additional bond within a certain time, and a failure to comply on the part of the defendant, he may be removed at any time. If not, when must the court remove him? Can it do so on the last day allowed him to give bond? Not so, for he has the *whole* of that day to comply with the order. Can it remove him on the next day? Not if the argument of the appellant is correct, for the case was only continued to the day before, which in this case was the 12th of April, or perhaps the 24th of May. But the fact is, the court can remove him at any time after the expiration of the time allowed him to give the bond. For if it can not do this, it can not remove him at all, not having the power to remove within the time.

By failing to obey the order, the removal of the executor follows of necessity and as a matter of course.

The usual and proper order in cases of this kind is, that the administrator is required to give an additional bond, and that he be allowed a certain time to do so, and this is

all ; there is no order for a continuance, nor is one proper ; there is nothing to continue ; the cause has been fully tried and determined.

B. F. SAFFOLD, J.—This case was brought to this court by *certiorari*, under the following circumstances : On the 15th of February, 1869, W. N. Boynton, the executor of the will of Alanson Saltmarsh, was cited by the probate judge to show cause, on the 8th of March, why he should not be required to give an additional bond. At that time, he was ordered to give the bond by the 12th of April. From this last date the cause was successively continued to the 24th of May, when no action at all was taken. At a special term held on the 17th of August, an order was made removing Boynton.

While this proceeding was pending, another was progressing to require the executor to make a settlement of his administration. It commenced on the 25th of January, 1869, by an order to him to file his accounts for settlement by the 8th of February. It was successively continued to the 24th of May, when the accounts were filed and set for hearing on the 26th of June. The cause was continued to the 2d, 17th, 24th and 31st of August, and then to the 13th of September, when no action was taken.

On the 15th of September, Boynton applied to the court by petition to set aside the order removing him for the reasons therein stated. The hearing was appointed for the 22d of September, and was continued to the 6th and 19th of October, and the 5th and 10th of November, when it was overruled.

Nelson was appointed special administrator on the 18th of August, the day after Boynton was removed.

Upon the overruling of his petition, Boynton applied to one of the justices of this court for a *certiorari* to review the action of the probate court removing him from his executorship, on the ground, mainly, that it was void because the order of removal was not made at a regular term of the court ; but at a special term to which the cause had not been adjourned, and the time in which an appeal

might have been taken had elapsed before he became informed of such order.

The proposition is undeniable that the acts of a court held at a time and place not authorized by law are absolutely void.—Bouv. Law Dict., Judgment. Was the probate court authorized to make the order which it did on the 17th of August, 1869? Its powers of holding courts are appointed by section 795 of the Revised Code. "A court of probate must be held at the court-house of each county on the second Monday in each month, and the judges may hold special or adjourned terms, at any time whenever necessary for any special purpose; but such courts must at all times be considered as open, except on Sundays, with authority to do all things needful in relation to granting letters testamentary, of administration, or guardianship, and all matters appertaining thereto; binding out apprentices, and making all other necessary orders, which are grantable as a matter of course."

In aid of the validity of judgments of courts of general jurisdiction, which the probate court is, many intendments or presumptions are indulged. For instance, the acts of a court will be presumed to have been made at a proper term, unless the reverse appear; and in collateral, or even direct assaults, when the purpose is to have them declared void, the record itself must exhibit the error.—*Duval's Heirs v. McLoskey*, 1 Ala. 733. But when the record shows facts which are inconsistent with the validity of the judgment, the jurisdiction can not be presumed from its mere exercise. Again, from the service of process until the final judgment, the parties are presumed to be in court, and need no further notice of orders taken in the cause.—*Harrison v. Meadows*, 41 Ala. 278. But these orders must be such as the court may legally grant at the time. If they appear from the record to be otherwise they are invalid.

Section 2090, Revised Code, adds the probate judge to the list of those who may require an additional bond of an executor or administrator on proof of one or more of the grounds specified in section 2018. These proofs are to be heard by the court on the day specified in the citation to

the executor, or administrator, or any day thereafter to which the hearing may be continued.—§ 2024. If the bond be required, an order to that effect must be made, allowing such time as the court may think reasonable.—§ 2027. If it be not given within the time prescribed, the executor or administrator must be removed by the court, and his letters revoked.—§§ 2028–29.

I imagine no appeal can be taken from the order requiring the additional bond, because none is expressly given, and it is not a final order. The party can not be said to be injured, unless he is removed. Besides, if he give the bond, his liability is not thereby increased beyond what it should be, and if he fail to do so he has his remedy on his appeal from the order removing him.

It is plain from § 2024, above cited, that the order requiring the bond can not be made at any special term different from that specified in the citation, or that to which the cause may be continued. It is claimed, however, in this case, that the order of removal, after the failure to give the bond at the time appointed, was grantable as a matter of course on any day except Sunday.

The authorities cited in support of this proposition are sections 2028, 2029, which say the letters must be revoked, and *Arrington v. Roach*, 42 Ala. 155, to the effect that "All orders which are made without notice, and are necessary, are to be considered as grantable, as matters of course." These authorities cannot be said to conclude in this respect a solemn decree divesting a party of a right, and an interest in property, acquired by the act of another, from which he may appeal directly, and which was not rendered in response to any motion or application made by him. The removal of an executor without notice is void.—*Goodwin, ex'r, v. Hooper*, January term, 1870.

It was important to this executor that he should have had notice, actual or constructive, of the time when the order removing him was made, because the amount of the new bond required of him does not appear to have been fixed, and perhaps on that may have depended his ability to give it. Besides, his right of appeal continued only for

Boynton v. Nelson.

five days. In both of the cases, *Harrison v. Meadows*, 41 Ala. 278, and *Allman v. Owen*, 31 Ala. 167, cited by the appellee in support of his proposition, much stress was laid upon the fact that Boynton had constructive notice, that the assignments of error were not sustained by the record. In the first there was no entry, or other thing of record, showing that the decree was rendered at a special term; and, therefore, it was presumed to have been rendered at a regular term. In the other, the decree alleged to have been rendered in vacation, was shown by the record to have been rendered when a regular term ought to have been held. The plain inference from these cases is that the decrees would have been held void if the allegations had been properly supported.

No aid to the presumption of notice can be derived from the fact that the times appointed for the partial settlement coincided twice with those directed for the consideration of the question of removal, to-wit, the 10th and 24th of May, and that this settlement was regularly continued to the 17th of August, when the order of removal was made. Beginning prior to the demand for a new bond, the settlement was continued along with many postponements to intervals only a few days apart from the other, without any allusion at any time, in the one to the other. There was no necessary connection between them, nor did the court or the parties seem to treat them as in any way connected. On the 24th of May, Boynton was present, and filed his accounts, but no action was taken in the other. The settlement at that time was appointed for the 26th of June, and was continued to the 2d and 17th of August, and on to the 13th of September, when it was abandoned, to give place to the final settlement consequent upon the removal.

No action was taken on the proceeding, in reference to the bond, from the 24th of May until the 17th of August, when, as shown by the record, at a special term held that day, he was formally removed, for failing to comply with the order of the 8th of March, 1869, which had been extended to the 24th of May. This decree not only fails to state that the cause had been continued to this day, but

the plain meaning of the recitals is that nothing had been done in the matter since the 24th of May. We know judicially that a regular term could not commence on that day, and we cannot presume that there was a continuation of such a term, because the record says it was a special term. The decree of removal is, therefore, void, from having been rendered at a special term, to which the cause had not been adjourned or appointed.

We are asked to review the former judgment of this court overruling the motion to dismiss the *certiorari*. The ground of this request is, that Boynton had the right of appeal from the judgment adverse to his application to set aside the order removing him. It is alleged correctly that this court has frequently entertained appeals brought here under similar circumstances, and the case of *Satcher v. Satcher*, (41 Ala. 26,) is cited as an instance. In none of these cases does there appear to have been any question made on the right of appeal. Besides, the rule of practice, that no errors will be considered except such as are assigned, this court has been disposed to terminate the litigation by a decision of the merits of a cause, unless the irregularities of practice are sufficiently great to produce confusion.

Hayes v. Cockrell, (41 Ala. 75,) and *Garrison v. Burden*, (40 Ala. 53,) are cases in which the appeals were dismissed at the cost of the appellants, because the judgments appealed from were void, ascertained to be so after a careful consideration of the merits of the causes. In this case the question was one of nullities. If the removal of Boynton is valid, an order setting it aside would be void ; and hence, on Nelson's appeal he would have lost his suit by the establishment of his right. The final judgment, order or decree which will support an appeal, in the contemplation of the statute, is one rendered upon some matter or proceeding in the court upon which a decree may be rendered, and from which either party may appeal if the decision be adverse to him.

While we would not follow the authorities above cited in 40th and 41st Alabama, so far as to dismiss an appeal taken

to reverse a judgment which we decided to be void, we can not subscribe to the doctrine that a review of all the judgments and decrees of the various courts of this State, for an indefinite past time, may be forced on this court through a right of appeal obtained by a mere motion to set them aside made in the lower courts. *Certiorari* is a common-law writ of review. Its grant is discretionary, and on this account the judge, or court, is enabled to stop on the threshold a proceeding which promises to be unjust and vexatious. While a party who has a right of appeal should be confined to that remedy, his privilege of obtaining a *certiorari* is not taken away by implication merely. To deny him the latter in a case calling for relief, when the appeal is lost without fault on his part, is a refusal of justice. To enable him to restore his right of appeal, when it may have been lost through his neglect, by a motion to set aside the judgment of which he complains, is to accord him more than his right, to the detriment of the opposite party. From these considerations, we think our former decision was right.

The order of the probate court is reversed, and the cause remanded.

LOGAN vs. THE MOBILE TRADE COMPANY.

[ACTION AGAINST COMMON CARRIER FOR DAMAGES TO GOODS, &C.]

1. *Bill of lading ; how construed.*—A bill of lading is a contract, the language of which is subject to the rules of construction which govern other contracts.
2. *Same ; recitals and stipulations in, obligation and effect of.*—The recitals and stipulations of a bill of lading were as follows : “Shipped in good order and condition by Jewett, Hall & Co.———(on account and risk of whom it may concern) on board the good steamboat called the Virginia and Mobile Trade Company, whereof——— is master, for the present voyage, now lying at the port of St. Louis, Mo., and

Logan v. The Mobile Trade Company.

bound for Montgomery, Ala., the following packages or articles marked and numbered as below, which are to be delivered, without delay, in like good order and condition at the aforesaid port, (the damages of the river, fire and unavoidable accident only excepted,) unto Rufus L. Logan or their assigns, he or they paying freight for said goods at the rate of 30 cents per 100 lbs. to New Orleans, \$1.98 per bbl. flour (through), and \$6.35 per cask, \$3.05 per tierce bacon, and 93 cents per box crackers, thence to Montgomery. In witness whereof the owner, master or clerk of said steamboat subscribes to four bills of lading, all of this tenor and date, one of which being accomplished the others to stand void. Dated at St. Louis, Mo., this 2d day of October, 1866." (Here follows a description and weight of the goods.) "Privilege of re-shipping at New Orleans and Mobile," (signed,) "Jewett, Hall & Co., Agt's, M. T. Co." "It is understood and agreed that the above goods are to be sent through at above rates, if any boats are going through to Wetumpka," (signed,) "Jewett, Hall & Co., Agt's, Mobile Trade Co." *Held*, that it imposes an obligation on the party making it to send the goods therein named "through to Wetumpka," either from Mobile or Montgomery, "if any boats are going through to Wetumpka," when the goods are delivered either at Mobile or Montgomery.

3. *Same; party making, for what liable.*—If such goods are so forwarded, by the party making said bill of lading, to Wetumpka, either from Mobile or from Montgomery, the said party becomes liable for illegal injuries to the same, whether sent by boats of the maker of the bill of lading or by those of another owner.

• This is an action by appellant against appellee, a common carrier, for damages to goods in shipment. The bill of lading is set out at length in the opinion. On part of appellant it was in proof that the freight was discharged from the "Nyanza," appellees' boat, at Montgomery, received by Terry, appellees' agent, and remained on the wharf for five days, when it was shipped by the agent to Wetumpka, on the "Montgomery," a boat not owned by appellees; that the "Montgomery" looked to the appellees for charges, and that the freight was not delivered to the appellant at Montgomery. There was evidence tending to show that the "Nyanza" engaged to carry said freight to Wetumpka. There was evidence showing the damaged condition of the freight when landed at Montgomery, and additional damage sustained between Montgomery and Wetumpka. It was further proved by appellant that during the time of this shipment three safe boats were running from Mobile through to Wetumpka. On part of

appellee, there was proof tending to show that the "Ny-anza" did not run through to Wetumpka, and was not engaged to carry this freight through to that point. Upon these facts the court charged the jury, (among other things,) that "the legal effect of the bill of lading, and the note appended to it was an undertaking by the defendants to deliver the goods at Montgomery, and from that point to send them to Wetumpka, should there be any boats going through to the latter place; that upon a delivery of the goods at Montgomery, according to the terms of the bill of lading, the liability of the defendants as common carriers would cease; that after such delivery their liability, by virtue of the note appended to the bill of lading would be that of agents for the re-shipment of the goods to Wetumpka, and that if the defendants observed the proper degree of care in re-shipping the goods to Wetumpka from Montgomery, they would not be liable for any damage done to the goods by the negligence or carelessness of the officers and crew of the steamer 'Montgomery,' after they had received the goods." The appellant excepted to this charge, as well as to the refusal of the court to give the following charge:

1. If the jury believed from the evidence that the "Ny-anza" was in the employment of the defendants, and engaged to carry said freight to Wetumpka, but concluding not to go to Wetumpka, landed the freight at Montgomery, and sent it forward by the steamer "Montgomery" to Wetumpka, then the defendants are liable for the negligence and carelessness of the officers and crew of the "Montgomery" in regard to this freight.

The charges given, and those refused by the court, are now assigned as error.

SMITHS & HERNDON, for appellant.

DARGAN & TAYLOR, *contra*.

(No briefs came into Reporter's hands.)

PETERS, J.—This case depends upon the construction

 Logan v. The Mobile Trade Company.

of the bill of lading upon which this suit is founded. This contract is in these words, viz:

“JEWETT, HALL & Co.,

“*Produce and Commission Merchants,*

“No. 22 South Main street, (Merchants' Exchange Block,)

“St. Louis, Missouri.

“Shipped, in good order and condition, by Jewett, Hall & Co.,—————(on account and risk of whom it may concern,) on board the good steamboat called the Virginia and Mobile Trade Company, whereof————— is master, for the present voyage, now lying at the port of St. Louis, Mo., and bound for Montgomery, Ala., the following packages or articles marked and numbered as below, which are to be delivered, without delay, in like good order and condition, at the aforesaid port, (the damages of the river, fire, and unavoidable accident, only excepted) unto Rufus L. Logan or his or their assigns, he or they paying freight for said goods, at the rate of 30 cents per 100 lbs. to New Orleans, \$1.98 per bbl. flour through, and \$6.35 per cask, \$3.15 per tierce bacon, and 93 cents per box crackers, thence to Montgomery.

“In witness whereof the owner, master or clerk of said steamboat subscribes to four bills of lading, all of this tenor and date, one of which being accomplished, the others stand void.

“Dated at St. Louis, Mo., the 2d day of October, 1866.

<i>Marks.</i>	<i>Articles.</i>	<i>Weight.</i>
R. T. L.	1 cask sides,	1052
Wetumpka,	1 tierce hams,	476
Ala.	8 boxes crackers,	309
Logan,	100 bbls. flour (various brands.)	
Wetumpka,	Privilege of re-shipping,	
Ala.	at New Orleans and Mobile.	
	JEWETT, HALL & Co., Ag'ts,	
	M. T. Co.	

“It is understood and agreed that the above goods are to be sent through at above rates, if any boats are going through to Wetumpka.

JEWETT, HALL & Co., Ag'ts Mobile Trade Co.

This bill of lading is in the usual form, except the stipulation at the foot.—Abbott on Shipment, 216, 217. It was offered to the jury in evidence without objection. And the question which arises upon the instrument thus set forth is, did it bind the trade company to deliver the goods mentioned therein, at Wetumpka, under any circumstances, or only at Montgomery? A bill of lading is a contract, which binds the parties to it according to the meaning of the language in which it is expressed. And the words of the instrument are to be taken most strongly against the party employing them. *Verba chartarum fortius accipiuntur contra proferentem.*—Broom's Max. ; 2 Pars. on Cont. p. 506, 5th ed. It does not alter the force or construction of a contract that the several stipulations it may contain are separately signed by the party making it. This is but the effect of the general signature at the foot of the instrument, when it is signed as a whole. Here the understanding and agreement that the goods were to be "sent through to Wetumpka," was to be controlled by the condition, "if the boats are going through to Wetumpka." The most reasonable construction of this language is that the trade company bound itself to deliver the goods at Wetumpka, if after reaching Montgomery there were boats going thence to Wetumpka. Otherwise, the stipulation fixing the "rates" of the freight would be absurd. "The above rates" means the rates already fixed. This would not have been done unless the trade company intended to assume the responsibility, and to fix a compensation for it. The language will reasonably bear the construction above given ; it is the most favorable to the plaintiff below, and he is entitled to it. It may also be said with equal reason, as the defendant below was entitled to re-ship the goods at Mobile, that it was bound to re-ship from that port "through to Wetumpka." The language of the bill of lading does not confine the shipment "through to Wetumpka" to the boats of the trade company, but it is extended to "any boats going through to Wetumpka." The bill of exceptions shows that there was some proof tending to establish the fact that the goods mentioned in the bill of

lading might have been sent through from Mobile to Wetumpka, and also that they were sent by the trade company from Montgomery through to Wetumpka. In the one case as well as the other, if the goods were sent by the trade company, and injured on the way, except for the causes set out in the bill of lading, the defendant in the court below became liable to plaintiff for the injury thus sustained.

The charge of the court below is hostile to this construction of the contract or affreightment contained in the bill of lading. In this the learned judge erred.

The court also erred in refusing to give the first charge asked by the plaintiff in the court below. There was some testimony tending to prove the facts on which it was based. That this testimony was very weak, or was contradicted by other evidence before the jury, did not justify the court in refusing a proper charge based upon it. No charge is abstract when there is the slightest testimony to support it. The court cannot judge of this. It must be left to the jury, upon a proper charge of the law from the court.—*Partridge v. Forsyth*, 29 Ala. 200 ; 28 Ala. 236. The charge here asserted a correct legal proposition, and should have been given. It was, therefore, error to refuse it.

It is probable that the question raised upon the second charge asked by the plaintiff below, and refused by the court, may not again arise upon a new trial. Its discussion is, therefore, omitted.

For the errors above pointed out, the judgment of the court below is reversed, and the cause is remanded for a new trial.

DARNELL vs. GRIFFIN.

[TROVER FOR CONVERSION OF COTTON.]

1. *Sale of an article, when complete.*—The sale of a specified article for money, when the money is paid is complete, and transfers the title to the purchaser without a delivery, either actual or constructive.
2. *Charge limiting the examination of the jury, when erroneous.*—A charge asked, that tends to limit the examination of the jury to a part only of the evidence, to the exclusion of other important evidence in the case, is erroneous, and should be refused.
3. *Sale; agency, what warrants the inference of.*—In an action for the conversion of two bales of cotton, bought by plaintiff of a third person, which a short time before the sale is shown to have belonged to the defendant, a statement by defendant to plaintiff that "the trade was a good one," and that "he laid no claim to the cotton," justifies the inference that defendant had either sold the cotton to plaintiff's vendor, or had authorized him to sell it.

APPEAL from Circuit Court of Sanford.

Tried before Hon. L. R. SMITH.

The facts appear in the opinion.

WALKER & MURPHEY, for appellant.—1. The contract of sale in this case was incomplete until the cotton was weighed and the credit given on Sutherland's note.—*Screws v. Roach*, 22 Ala. 675; *Magee v. Billingsley*, 3 Ala. 679.

2. The case of *McCrea v. Young*, 43 Ala. 622, is altogether different. In that case, there was a written conveyance, which of itself passed the title without a delivery. *Morgan vs. Smith, Wykoff & Nichol*, 29 Ala. 283. Besides, there was a contract on the part of the seller in that case to stand to the purchaser in the attitude of a bailee, and it is upon that that the court places its opinion.

— — —, *contra*.

PECK, C. J.—The appellee was plaintiff in the court

below. Her complaint contains two counts: one in trover, for the conversion of two bales of cotton; the other in trespass, for two bales of cotton. This, by the common law rules of pleading, was clearly a misjoinder of causes of action, but as no objection was made on this score in the court below, it need not be further noticed. There was a trial by a jury, and a verdict and judgment for the plaintiff.

There is a bill of exceptions, which purports to set out all the evidence, but it is so obscurely and inartificially stated as not to be very easily understood. The best I can make of it is, that sometime in the year 1864, one David Sutherland went to the plaintiff and represented to her that he had two bales of cotton, weighing each five hundred pounds, more or less, and offered to sell the same to her, and stated that the cotton was at P. Bowman's gin, where she could get it when she wanted to haul it away. Upon this statement, the bill of exceptions says, "the plaintiff took the trade, and paid Sutherland for it; the value of the cotton was thirty cents per pound."

The evidence further tended to prove that the defendant had, a short time before, owned the cotton at the gin; had never delivered it to Sutherland, or any one else; had promised to let Sutherland have the cotton when weighed, and a credit given defendant on a note which Sutherland held on him; that Sutherland never gave the credit, and never weighed the cotton, but, after plaintiff had agreed with Sutherland to take the cotton, defendant said to plaintiff, "How do you like the cotton trade?" and said "the trade was a good one, and he laid no claim to the cotton;" that the cotton was removed by defendant, who made the contract of sale with Sutherland, and was the same cotton Sutherland sold to plaintiff.

On this evidence, the defendant asked the court to charge the jury that "if they believed from the evidence that the cotton had not been weighed, and never was weighed, and the credit was not given to the defendant by Sutherland, the plaintiff could not recover." This charge

Darnell v. Griffin.

the court refused to give, and the defendant excepted. Thereupon the court charged the jury that "in order for the plaintiff to recover, they must believe, from the evidence, that the cotton was delivered to plaintiff by Sutherland, either actually or constructively." To this charge the defendant excepted.

1. The charge asked was properly refused. It tended to limit the examination of the jury to a portion only of the evidence, to the exclusion of other important evidence in the case; and made the finding of two facts indispensable to the plaintiff's recovery, to-wit, the weighing of the cotton by Sutherland, and the entering of the credit on defendant's note; whereas, the non-existence of one or both of these facts did not necessarily constitute a good defense. The important question was, had the defendant sold the cotton to Sutherland, or authorized him to sell it? As to this matter, the finding of either one of these facts entitled the plaintiff to a verdict.

The statement of the defendant to the plaintiff, that the trade was a good one, and that he had no claim to the cotton, reasonably justified the inference that defendant had either sold the cotton to Sutherland, or had authorized him to sell it. For these reasons, this charge was rightly refused, and this question left to the determination of the jury.

2. The charge given was more favorable to the defendant than he had any right to ask. The sale of the cotton by Sutherland to the plaintiff was complete without a delivery, either actual or constructive.

The payment of the purchase-money perfected the sale, without a delivery, and, as between Sutherland and the plaintiff, transferred the title to her.—Chitty on Cont., 7th Amer. from 3d Lond. ed., 374. This author says, "if one sell me his horse, or other thing, for money, and the money is paid, I may sue for and recover the thing bought." This could not be done if the title did not pass from the vendor to the vendee. Taking all the evidence together, we think the verdict of the jury reaches, substantially, the justice

Dunkin v. Hodge.

and equity of the case, and we are not disposed to disturb it.

Let the judgment of the court below be affirmed, with five per cent. damages, at the cost of the appellant.

DUNKIN vs. HODGE.

[ACTION FOR THE RECOVERY OF MONEY DEPOSITED AS INDEMNITY WITH SECURITY ON A BOND FOR THE APPEARANCE OF A DEFENDANT CHARGED WITH A FELONY, &C.]

1. *An agreement to become bail; when void*.—An agreement by which one party receives a sum of money to become the bail of another accused of felony, in order that a defendant may be released from custody, so as to escape trial, is void, as obstructing or interfering with the administration of public justice. Money paid under such an agreement cannot be recovered back.
2. *Judgment final on bail bond; when cannot be compromised*.—A final judgment on an undertaking of bail cannot be compromised with the solicitor.
3. *Same; when cannot be assailed collaterally*.—Such an undertaking cannot be collaterally assailed as void, on the ground that the undertaking was approved by the sheriff, in a case of felony.
(PETERS, J., *dissenting*.)

APPEAL from Circuit Court of Perry.

Tried before Hon. MILTON J. SAFFOLD.

The appellee sued the appellant to recover from him money which the complainant alleged she had deposited with him as indemnity against his liability as bail for her son, who was in jail, under the commitment of a magistrate, for assault with intent to murder. He defended on the ground that the money was paid to him in consideration of his becoming bail for her son, so that he might get out of jail and run away. This defense was supported by his own testimony, while the complaint was sustained by

Dunkin v. Hodge.

two witnesses, one of whom was the party who made the agreement with the defendant, as agent of the plaintiff. A final judgment had been rendered on the bail bond for its full amount, \$1,000, which, it was claimed, had been satisfied by the payment of about \$250, under an agreement to that effect between the solicitor and the counsel of the accused.

The bail bond was approved by the sheriff; there was evidence tending to show that before suit, defendant, on demand by appellee's attorney, promised to refund. The defendant testified that he had no conversations with the plaintiff about going on the bond, and the witness who made the arrangement for the plaintiff, testified that he had no authority for the plaintiff to make the arrangement, that the defendant should flee from justice. The solicitor testified that he compromised the judgment, because strenuous efforts were being made to induce the governor to remit the amount, and he feared the governor would remit it.

Among other charges, the court gave the following, which was excepted to by the appellant: "That the defendant Dunkin having admitted in his testimony, that he was induced to and did go on the bond, under the expectation and for the purpose of making money, believing that Plummer Hodge would, if bailed out, never return to stand his trial, and the case would be compromised; and based his defense on the ground that the transaction out of which the suit grew was illegal, and contrary to public policy, he can not invoke the aid of this court for his protection, and the jury cannot consider any matters of law or evidence alleged in his favor.

"If they believe, on the contrary, that plaintiff in no way knowingly and intentionally participated in the transaction which led to the non-appearance of Plummer Hodge to stand his trial, but deposited this money with defendant, as an indemnity against any legitimate loss he, defendant, might sustain, under the promise of defendant to refund all or any part of the amount not needed to re-imburse him any loss in money he might sustain, then she can re-

cover, and the measure of damages is the amount left in Dunkin's hands after payment to the solicitor, and interest from the time the demand on him was made."

To the refusal of the court to give the following charges, (among others asked), appellant excepted :

1. "That if the jury believe from the evidence that the agreement sued on in this case was made and entered into to prevent or impede the due course of public justice in the case of the State of Alabama against J. P. Hodge, on a charge of assault with intent to commit murder, then they must find for the defendant.

2. "That the liability of the defendant Dunkin, on his forfeited bond for the appearance of J. P. Hodge, on a charge of assault with intent to commit murder, could not be discharged by a compromise with the solicitor, and that any such compromise is a part payment of said liability only to the amount actually paid, under and by virtue of said compromise." The judgment of the court below was for the appellee.

BAILEY & BRAGG, and SHIVERS, for appellant.

(No brief for appellant came to Reporter's hands.)

J. C. REID, *contra*.—It is insisted, that if the bond for one thousand dollars, made by Hodge, appellant, and M. D. L. Stewart, was made expressly to get the said Hodge out of jail, in order that he might escape, and not appear for trial, that there is no proof to show that the appellee was *particeps criminis*, or that she was a party to any contract for that purpose. Under the contract then made by said appellant with Thomas G. Clancy, as the agent of appellee, she had the right to sue for and recover from the appellant the surplus of money left in his hands after being discharged from liability on said bond.

2. There is no evidence to show that H. H. Moseley, as sheriff, had any authority to take the bond of Plummer Hodge, Elias Dunkin, the appellant, and M. D. L. Stewart, a copy of which is set forth in the record. Bail must be

Dunkin v. Hodge.

taken by a court of competent authority, magistrates or other officer; or, if committed to jail upon a preliminary examination, the prisoner may give bond to the sheriff, if the committing magistrate has rendered in the commitment the amount of bail required, and signed his name thereto—Rev. Code, 4014, 4233.

3. The bond taken by the sheriff aforesaid is, therefore, null and void, and "is no more than so much blank paper." 16 Ala. 81.

4. If the bond was void, then the judgment rendered on said bond is void.—29 Ala. 141.

5. If the judgment rendered on said bond is void, then it may be collaterally assailed by the appellee.—21 Ala. 772; 20 Ala. 446; 23 Ala. 155; 17 Ala. 430.

6. The evidence shows that the judgment on said bond was compromised by John C. Reid, acting for the appellant and appellee in this case, with Rufus J. Reid, as solicitor, at two hundred and fifty dollars. Admitting that the said solicitor had no authority to make said compromise, yet under the evidence in this cause, it is submitted that the said appellant is estopped from setting up the want of authority in said solicitor to make said compromise.

7. Said bond being void, it was the duty of said appellant to have prevented judgment being rendered on the same, and if through his negligence or ignorance he suffered judgment to be rendered against him, he will not now be heard to complain, although he may be compelled to pay the balance of said judgment.

B. F. SAFFOLD, J.—The rules of law applicable to this case, as presented by the bill of exceptions, are as follows:

Such a contract as that set up by the defendant is one obstructing or interfering with the administration of public justice, and is void. The purpose of bail is to restrain as little as possible the liberty of the citizen, consistent with his retention until his guilt or innocence of the offense alleged against him can be ascertained by due course of law. Whatever may be the duty of a citizen who knows that an accused person is endeavoring to give the bail re-

quired of him in order that he may escape from trial, it is certainly against his duty to aid him to do so. The punishment of felony prescribed by law, can not be commuted by the payment of money. If the testimony sustained the defense, the plaintiff could not recover, because the agreement would be void as against public policy, and therefore the money could not be recovered back.—Add. on Con. 93, 96 ; *Edgcomb v. Rodd*, 5 East. 294. And, if valid, it gave the money to the defendant.

After the rendition of a judgment final on a forfeited bail bond, the solicitor has no authority to make any compromise in satisfaction of it. Neither has the court, after the adjournment of the term.

After judgment without objection on a forfeited undertaking of bail in a case of felony, which was approved by the sheriff, it will be presumed that he was authorized to do so by the proper court.—Rev. Code, 4241 ; old Code, 3408.

The ruling of the circuit court was not in conformity with the principles herein declared.

The judgment is reversed and the cause remanded.

PETERS, J., (*dissenting*).—The reversal in this case is proper, but I am not able to consent to the argument upon which it is based or the deductions from it.

Undoubtedly it is the right of all persons, before conviction, to be bailed by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great ; and excessive bail shall not in any case be required. Const. Ala. 1867, Art. I. § 18 ; Rev. Code, §§ 4234–35 ; *Ex parte Croom & May*, 19 Ala. 561 ; *Ex parte Banks*, 28 Ala. 89. After a defendant is once discharged on bail, I know of no law that confines him to remain in any one particular place or county in the State, or in the nation. It is neither immoral, criminal, or against the public policy, for a person who is not under arrest to go where he pleases, so he does not trespass upon the rights of others. He is not bound to remain in the jurisdiction. He is only bound to appear at the place and time appointed, or to pay a

Dunkin v. Hodge.

certain sum of money to the State for the use of the county, in which he stands charged.—Rev. Code, §§ 4239, 4244, 4254, 4255. And after his release upon bail from custody he may lawfully leave the court, the county, the State, or the nation. And he may go away at just such rate of speed as suits him, and at his own time. He may run away if he thinks it best. Then, a contract to aid one to procure bail for the purpose of running away, after his release from custody, is not illegal. And money deposited for that purpose, which is not used, may be recovered back by the true owner.—*Hitchcock et al. v. Lakens & Son*, 8 Port. 333.

The judgment on a forfeited bail piece is the property of the county. It is the duty of the county solicitor to attend to its collection; and for this purpose, he has the same power over it that any other attorney has over the case of his client. The county, then, through its proper authorities, may authorize him to compromise the judgment, or it may accept and ratify a compromise that the attorney may make. Such a judgment is a judgment in a civil suit, and it is governed by the law applicable to such suits.—*Dover et al. v. The State, &c.*, 45 Alabama, 244. The compromise of a prosecution is illegal and forbidden by the public policy, but this is not the case with a civil suit. A contract based upon the former is illegal, but not one based upon the latter.—*Phillips v. Kelly*, 29 Ala. 628; 2 Bennett & H. Lead. Crim. Cases, 258 *et seq.*; 1 Chit. Cr. Law, 4 *et seq.*; 1 Pars. on Con. p. 456 *et seq.*; 5th Ed. Rev. Code, §§ 3587, 3588; *ib.* § —; *Motley et al. v. Motley*, 45 Ala. 555.

For these reasons I feel compelled, most respectfully, to differ with the majority of the court in the application of the law sustaining the argument of the court in this case. In my opinion the plaintiff has clearly the right to recover, even if the accused in the criminal prosecution was bailed in order to afford him an opportunity to run away.

WILCOXEN *vs.* REYNOLDS.

[ACTION ON PROMISSORY NOTE.]

1. *Promissory note; what prima facie not dischargeable in Confederate currency.*—A promissory note made in this State on 31st October, 1863, for a certain number of "dollars," and payable January 1st, 1864, is not *prima facie* subject to be discharged by a payment in Confederate treasury notes. In such a note the word dollars means dollars in lawful money of the United States.
2. *Error without injury; what no ground for reversal.*—A charge of the court which is more favorable to the defendant objecting to it than the testimony justifies, is, at most, but error without injury, and is not a ground for reversal.
3. *Same; party complaining must show error.*—When a charge is of such doubtful meaning as to leave it uncertain whether it would produce a correct result or not, the party objecting to it, must show that he would be injured by it. Any process that will reach a correct result is sufficient.

APPEAL from Circuit Court of Dale.

Tried before Hon. J. McCaleb Wiley.

The facts are stated in the opinion.

J. L. PUGH, and SEALS & WOOD, for appellant.

W. C. OATES, *contra*.

PETERS, J.—This is an action of debt commenced on the twenty-fourth of September, 1866, in the circuit court of Dale county, and tried at the fall term, in the year 1870, of said circuit court. The cause of action was a promissory note, which was in the following words, to-wit :

"\$2175 90-100.

ABBEVILLE, ALA., Oct. 31, 1863.

On or before the first day of January next, I promise to pay Charles J. Reynolds, or bearer, the sum of two thousand one hundred and seventy-five 90-100 dollars, for value received."

JAMES WILCOXEN."

The appellee, Reynolds, obtained a judgment in the

court below, on the verdict of a jury for the sum of three thousand four hundred and thirty-six 84-100 dollars, and costs. From this judgment Wilcoxon appeals to this court.

There was a bill of exceptions taken by the defendant on the trial in the court below, from which it appears that the said defendant set up in defense to said action, that said promissory note was understood and agreed to be paid in Confederate treasury notes of the late "Confederate States of America," so-called. But the only evidence offered by the defendant in the court below, in support of this defense, was, that the note was given for the purchase-money, in part, of a tract of land; that the price given for the land was much above its real value; that the trade for the land was consummated in the State during the late rebellion, when the currency of the country was said Confederate treasury notes, and that the maker of the note understood that this currency would be the medium of payment, and that about fifteen hundred dollars of the purchase-money, for said land, was paid down on the consummation of the trade, for said land, in said Confederate currency, called "Confederate treasury notes." The whole price of the said land was seven thousand dollars, which was paid in notes and judgments, and said sum of fifteen hundred dollars in Confederate treasury notes, except the amount of the note sued on. This was the substance of the proof on the part of the defendant in the court below. On the part of the plaintiff, it was shown that the plaintiff did not agree to receive payment of said note in Confederate money, but only in lawful money; that nothing was said at the time the trade was agreed upon or consummated, or when the note was executed and delivered about its payment in Confederate money, or in any other kind of money, except what is mentioned in the note itself, and that the land was not sold for a price above its value, when it was considered how the price was to be paid, to-wit, in promissory notes and judgments on third persons, in the Confederate money paid down, and the balance mentioned in the note in controversy. The plaintiff, who was a wit-

ness for himself, testified that the note was not to be paid in Confederate money; that he did not want Confederate money, and would not have taken a wagon load of it for his land sold to the defendant, Wilcoxon. Upon this evidence the court, without being required to do so by one of the parties, gave the following charge in writing, to the jury:

“This is an action, gentlemen of the jury, brought by the plaintiff against the defendant on a promissory note. When the plaintiff read in evidence the note sued on and closed, this would entitle him to recover the whole amount of the note and interest thereon to date, unless the defendant, on his part, by proof, shows that the plaintiff ought not to recover, or if recover, not as much as claimed by the plaintiff. The defendant pleads that it was understood between him and the plaintiff that the note sued on was to be paid in Confederate treasury notes. Well, gentlemen, the law is that the defendant must satisfy you that this plea is true. The *onus* is on him to prove his plea. And before this plea can avail him, he must satisfy you that not only he so understood it, but that the plaintiff also understood it in that way. Whether or not this understanding, as set up in the plea, was had between the parties is a question for you, gentlemen, and you must decide it from the evidence in the case. If you shall believe that it was understood or agreed between the plaintiff and defendant, that said note was to be discharged by a payment in Confederate treasury notes, the defendant will be entitled to scale the notes under the ordinance of the convention of 1865, in this State. And in ascertaining how much to scale it, you will find out from the proof what was the real and true value of the land purchased by the defendant from the plaintiff, in good money, and then find a sum which shall bear the same proportion to the real value of the land as the note sued on bears to the nominal amount agreed to be paid for the land purchased, and this sum, so found, with interest from the date of said note, will be the amount of plaintiff's recovery. If you find for the plaintiff, you will say by your verdict, “We, the jury,

Wilcoxon v. Reynolds.

find for the plaintiff, and assess his damages" at so much. If you find for the defendant, you will simply say, "We, the jury, find for the defendant." To this charge the defendant excepted. It is now contended by the learned counsel for the appellant that this charge is erroneous, because the rule laid down therein by which the jury were to ascertain what amount the plaintiff is legally, justly and equitably entitled to receive on said note, provided the jury should believe, from the evidence, that said note was to be discharged by a payment in Confederate currency or treasury notes, under ordinance No. 26 of the convention of September 12, 1865, was different from that laid down in *Herbert & Gessler v. Easton*, 43 Ala. 547.

This charge is really more favorable to the defendant in the court below, who is the appellant here, than he was entitled to. There was no evidence in the court below which tended to show that the promissory note mentioned in the complaint was to be discharged by a payment in Confederate currency or treasury notes. The testimony of the defendant and the plaintiff in the court below clearly shows this. The currency referred to and named in the note is "dollars." This word expresses a certain value in the currency of the United States. In the singular, it means one hundred cents of the legal currency of the nation. This is its *prima facie* meaning when used in an obligation to pay a sum of money. It is, however, capable of being used in a broader and less technical sense. When this latter is the case, its meaning, even in a written contract, may be explained by parol so as to show the real intention of the parties; because it is the intention of the parties that makes the contract.—1 Pars. Cont. 475. But if this intention is different from that expressed in the written instrument, it can not be allowed to avail, unless it appears that all the parties to the contract concurred in it when the contract was entered into. The evidence in this case does not show this, nor tend to show it. There was no evidence, then, on which this charge could be based. The defendant was not injured by it. It was too favorable to him. The mere fact that a promissory note, made in

Scruggs & Lindsay, Ex'rs, et al. v. Orme, Assignee.

this State on the 31st day of October, 1863, and payable in this State on the 1st day of January, 1864, without more, is not *prima facie* evidence that such note was agreed and understood by the parties to be discharged by a payment in Confederate treasury notes, when there is no expression in the note which indicates this intention.

The charge of the court above quoted is certainly not free from considerable obscurity. And, if properly understood, it may not violate the rule laid down in the case of *Herbert & Gessler v. Easton*, 43 Ala. 547. And if it does not, it is not erroneous. It does not necessarily follow that the same result may not be reached by more than one process. A party complaining of error must show that it exists, and that he has been injured by it, else it will not be grounds for reversal.—Shep. Dig. p. 508, § 82.

The judgment of the court below is affirmed.

SCRUGGS & LINDSAY, EX'RS, ET AL. vs. ORME, ASSIGNEE.

[BILL IN EQUITY FOR SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS, &C.]

1. *Presumption of final settlement of estate after lapse of twenty years ; by what avoided.*—The presumption of the final settlement and distribution of an estate, after the lapse of twenty years, is avoided, in favor of a distributee, by proof of an annual settlement within the time, and the absence of the administrator from the State a sufficient length of time, during the period within which he might have been called to account.
2. *Annual settlement ; prima facie correct.*—An annual settlement of an estate is to be taken as *prima facie* correct on final settlement.

APPEAL from Chancery Court of Madison.

Heard before Hon. WM. SKINNER.

THE report of the case when it was in this court under

Scruggs & Lindsay, Ex'rs, et al. v. Orme, Assignee.

the name of *Ragland's Ex'rs v. Morton*, as referred to in the opinion, is as follows :

“ The bill in this case was filed on the 6th August, 1860, by Daniel S. Morton, against John W. Scruggs and Robert B. Lindsay, individually, and as executors of the last will and testament of George O. Ragland, deceased, together with the children and heirs-at-law of said Ragland and his deceased wife ; and sought to compel a settlement of said Ragland's administration on the estate of David Morton, deceased, and a decree for the complainant's distributive share of said estate, or of the assets belonging to said estate for which said executors or their testator might be found liable. According to the allegations of the bill, said David Morton died, intestate, in Franklin county, Alabama, prior to September, 1838 ; leaving his widow, Mrs. Mary Morton, and his two sons, Quinn and David S. Morton, as his heirs-at-law and distributees. In September, 1838, Mrs. Mary Morton married said George O. Ragland, by whom she afterwards had several children ; and she died, intestate, in 1858, leaving her husband and children as her distributees and heirs-at-law. ‘ On or about the 6th December, 1838, said George O. Ragland was duly appointed, by the probate court of Franklin county, administrator *de bonis non* of the estate of said David Morton, deceased, and took upon himself the burden and duties of said office as administrator. At the March term, 1839, said Ragland, as such administrator, recovered a judgment for one hundred and eleven 90-100 dollars, against one John W. Hodges, who was the former administrator of said estate, and who had resigned, or been removed ; and said Ragland afterwards collected said judgment from said Hodges. Said Ragland, as such administrator *de bonis non*, possessed himself of other personal property belonging to said estate, amounting in value to twenty thousand dollars and upwards. Said Ragland never returned to said probate court of Franklin an inventory of the property in his possession belonging to said Morton's estate ; never made a final settlement of said estate, nor annual settlements of the same, but treated and managed the property as his own—worked

Scruggs & Lindsay, Ex'rs, et al. v. Orme, Assignee.

the negroes of the estate with his own, for his own use and benefit, keeping no account of their hire, profits, or services; removed them from this State, without legal authority carried them, at one time, to Memphis, Tennessee, where he kept them for several years; then moved them to Chattanooga, and afterwards to Madison county, Alabama, and sold some of them without authority; and the balance of the negroes belonging to the estate of said David Morton are now employed by said Scruggs and Lindsay, for the profit and benefit of the estate of said Ragland. Said George O. Ragland departed this life some time in the year 1858, having made and published his last will and testament, in which he appointed said John W. Scruggs and R. B. Lindsay the executors thereof; and said Scruggs and Lindsay, soon after the death of said testator, duly proved said will in the probate court of Franklin county, and took upon themselves the burden and execution thereof.' A copy of the will of said Ragland was not made an exhibit to the bill; nor was there any reference in the bill, or in any of the amendments thereto, to the annual or partial settlement of his accounts by said Ragland in 1844.

"The executors filed an answer, in which they incorporated a demurrer for want of equity, and on account of the lapse of time and the staleness of the demand; and they also pleaded the statute of limitations and the staleness of the demand, as a bar to the relief sought. The chancellor overruled the demurrer, and, on final hearing on pleadings and proof, rendered a decree for the complainant."—See 41 Ala. pp. 344–6.

This court then reversed the decree of the chancellor, and remanded the cause, in order that complainant might amend his bill so as to bring the cause within some of the exceptions to, or relieve from the operation of, the general rule, of a presumption of final settlement of an estate after the lapse of twenty years.—See 41 Ala. 348.

After this the original bill was amended, and complainant having been adjudged a bankrupt, his assignee was made party complainant.

The amended bill alleges—

Scruggs & Lindsay, Ex'rs, et al. v. Orme, Assignee.

1st. That Ragland in his will, made in 1859, admitted his administration of David Morton's estate to be an unsettled and continuing trust.

2d. That in 1844 he made an annual settlement of said estate, and executed an additional administration bond.

3d. That he was absent from the State for seven years, between the years 1833 and 1859.

The will of Ragland is also made an exhibit.

The evidence in support of these allegations is sufficiently stated in the opinion.

The chancellor, on the hearing, overruled the plea of the statute of limitations and staleness of the demand, &c., and directed a reference to the register, to state an account, &c., as required in the decree rendered in the cause in 1866, which, among other orders not necessary to be further noticed, directs the register to charge Ragland's estate with the hire of the Morton slaves from the time they went into his possession until the date of his death, with interest thereon, &c.

In the account so taken the register charged items for the hire of the slaves from the year 1838, and the chancellor overruled the exceptions to this report, and duly confirmed the same.

The decree rendered and the confirmation of the report are now assigned as error.

WALKER & BRICKELL, for appellants.

CABANISS & WARD, *contra*.

B. F. SAFFOLD, J.—The facts of this case are so fully stated in *Ragland's Ex'rs v. Morton*, (41 Ala. 344,) its style when here before, that it is necessary only to recite such as have since been brought into issue. The bill was amended after its remandment, by the addition of three allegations in avoidance of the staleness of the demand: 1st. That Ragland in his will, made in 1859, admitted his administration of David Morton's estate to be an unsettled and continuing trust. 2d. That in 1844 he made an annual settlement of the said estate, and executed an additional

Scruggs & Lindsay, Ex'rs, et al. v. Orme, Assignee.

administration bond. 3. That he was absent from the State for seven years, between the years 1838 and 1859.

It is well settled in this State, that the lapse of twenty years from the time an administrator might have been called to a final settlement, creates the presumption of such a settlement, and a distribution of the estate. But this presumption may be rebutted by proof of a clear and unequivocal recognition, within the time, of a subsisting and continuous trust.—*Johnson v. Johnson*, 5 Ala. 90; *McCartney's Adm'r v. Bone*, 40 Ala. 533. It is said in some of the authorities that this presumption is not avoided without proof of an effort within the time to compel a settlement.—*Austin v. Jordan*, 35 Ala. 642; *Rhodes v. Turner*, 21 Ala. 210. We do not regard these last authorities as affirming the necessity of action on the part of those claiming rights against the administrator, in contradistinction from his admission of a continuing trust. No such issue was made, and there seems to have been in those cases neither admission on his part, nor action by the adverse party. The weight of authority is against such a construction.—2 Williams on Ex'rs, § 1741; *Ravenscroft v. Frisby*, 1 Coll. 16, 23; *Portlock v. Gardner*, 1 Hare, 594.

Does the evidence establish any sufficient reason why the presumption should not prevail in this case?

In 1844 Ragland made an annual settlement of his accounts, the result of which was a balance in his favor. A final settlement would not be so suggestive of a continuing trust as this. It might be made out of precaution simply, and long after the matters involved had been fully adjusted. But an annual settlement supposes another more complete to be afterwards necessary. It is an admission of a liability to account to others, in the character assumed, precluding the termination of both.

The provision made in Ragland's will for David S. Morton, on the condition that he "release my estate from all liability to him by reason of my being his guardian, and also by reason of my being administrator of his father's estate," should not be taken as a recognition of a subsist-

Seruggs & Lindsay, Ex'rs, et al. v. Orme, Assignee.

ing trust. It would be attaching to a single word, and even to its tense, a controlling influence inadmissible even in the construction of writings more formal and critical. It was, however, an admission that he had occupied such a relation towards his step-son, and that he had not properly accounted to him. Ragland died in 1859, and his wife in 1858. Though the record does not show his age definitely, David S. Morton was probably not more than twenty-five years of age when he filed this bill in 1860.

Ragland was absent from the State for about seven years immediately succeeding the year 1841. Section 2808 (2453) of the Revised Code requires the time a person is absent from the State during which a suit might have been brought against him, to be deducted from the period necessary to create the bar of the statute of limitations. In the former decision of this case, (41 Ala. 344,) it was said that the removal of the slaves to Tennessee, and the keeping them there for several years, did not relieve the case from the rule of presumption. The court probably did not consider this statement equivalent to the averment now made of Ragland's absence. It is true, we are not called on to apply a statute of limitations, but to determine the staleness of a demand. Nevertheless, equity applies the rules governing the one to the ascertainment of the other, in proper cases. In addition to the other evidences of a subsisting and continuing trust, is the testimony of Samuel J. Ragland, that George O. Ragland acted as the administrator of David Morton, deceased, from 1838 to the time of his death. This witness was his brother, and was engaged with him in business for several years of the time. He further says, that nearly or quite all of the slaves which George O. received as the property of his intestate, he still had in his possession at the date of his death. We think the evidence sustains the decision of the chancellor on this point.

The decree of 1844 ascertained a balance in favor of the administrator, Ragland. No evidence is given of any error in this settlement, but the chancellor ignored it, and charged the administrator with the hire of the property

Atkins v. Knight.

from 1838. This was error. The annual settlement was *prima facie* correct. We discover no other errors in the record.

The decree is reversed, and the cause remanded.

ATKINS vs. KNIGHT.

[ACTION BY ENDORSEE AGAINST MAKER OF PROMISSORY NOTE.]

1. *Promissory note, action; endorsee against maker, what valid defense.*—In a suit by an endorsee against the maker of a promissory note, it is a valid defense that it was given in consideration of the notes and accounts of another person, and payable when they were collected, which had not been done, and that the plaintiff obtained it after maturity.
2. *Same, fraud of maker and payee, when no defense.*—The fraud of the maker and payee of a note in ante-dating it, for the purpose of practising a deceit on a third person, and making it appear an absolute promise to pay, when, in fact, its payment depended on the success of the deceit, can give no protection to the maker, nor aid to the endorsee after maturity, in a suit for its collection.
3. *Negotiable note, what required of purchaser after maturity.*—It is better to require one who would purchase a negotiable note after its maturity to ascertain whether it is a subsisting demand, than to subject the antecedent parties to the necessity of tracing to him a knowledge that it was not.
4. *Plea in bar, suggesting claimant; when subject to demurrer.*—A plea in bar which in substance merely suggests another claimant for the money sought to be recovered without a request for an interpleader, is subject to demurrer. Also, when the matter arose after the commencement of the suit, and is not pleaded *puis darrein continuance*.

APPEAL from Circuit Court of Butler.

Tried before Hon. P. O. HARPER.

This is an action by Knight, as transferee, against Atkins, as maker of a promissory note.

The defense was *non assumpsit*, failure and want of consideration, "with leave to give in evidence any thing that

might be good matter of defense under any plea not required to be sworn to," and a special plea alleging in substance that Yeldell, the payee of the note, being insolvent and in contemplation of bankruptcy, with a view of preferring a creditor, and in fraud of the bankrupt act, within less than four months before his adjudication of bankruptcy, transferred said note, after its maturity, to one Donald in payment of an antecedent debt; said Donald knowing the insolvency and contemplated bankruptcy of Yeldell; that plaintiff received said note from Donald after maturity. Oath to this plea was waived. A demurrer to the special plea was sustained by the court, to which the defendant excepted.

The plaintiff then read the note, which was as follows:

"\$400. One day after date, I promise to pay J. M. Yeldell or bearer four hundred dollars for value received for Dr. G. B. Herbert's notes and accounts.

JAMES O. ATKINS.

Monterey, Dec. 1, 1866."

and proved that by successive transfers it was his property.

The defendants' testimony tended to prove that there was a simulated contract between him and Yeldell, by which he, for the benefit of Yeldell, was to appear to have purchased absolutely some claims against Dr. Herbert, who was insolvent, and to use them as a set-off against a note of the said defendant made to Dr. Herbert, and transferred to one Dunklin, who shortly after this sued defendant. If defendant succeeded in so using the said claims, he was to pay Yeldell the amount of the note then made, but he was not to pay the note if he failed to so use the claims of Dr. Herbert.

This agreement was evidenced by a writing executed contemporaneously with the note; and both the note and agreement were ante-dated, so as the better to enable the defendant to use the claims as a set-off.

Yeldell, in violation of his agreement, put the note in circulation after its maturity by endorsing it to Donald, from whom the plaintiff obtained it, without actual knowledge of the above facts. The defendant failed in his at-

tempt to use the claims of Dr. Herbert, as a set-off to Dunklin's suit, and they have not been made available. There was no other consideration for the note.

Upon this evidence the court, among other things, charged the jury that "if defendant and Yeldell agreed to make, and did make, the note sued on in this case for the purpose and with the intention that defendant should by means thereof defeat a recovery by Dunklin on the note that had been transferred by Herbert to Dunklin; then the transaction was fraudulent, and if such note was transferred to plaintiff, even after it was due, and plaintiff had no notice of the fraud, and had paid value received for it, then the plaintiff was entitled to recover." To this charge the defendant excepted, and asked the court to give the following:

"1st. If the jury believe that defendant and Yeldell, the payee, executed the note for the sole purpose of defrauding another party, then the transaction being tainted with fraud no person who took the note from Yeldell after it was due could recover on the note.

2d. If the note was founded in a fraudulent transaction, it is void, and does not become good if traded to another after it is due.

3d. If the jury believe it was the understanding and agreement of the parties, Yeldell and Atkins, at the time the note was made, that the note was not to be paid unless Atkins collected certain notes and accounts from Dr. Herbert, then Atkins is not liable to pay the note unless he has collected said notes and accounts, or unless he has in some way violated his contract in relation to the collection of said accounts and notes.

4th. Though Atkins and Yeldell may have intended to perpetrate a fraud on Dunklin, yet if their attempt did not work any actual injury to Dunklin, then their attempt would not be such a fraudulent transaction as would prevent Atkins from defending this suit by showing a failure of consideration.

5th. No man who buys a promissory note after it is due,

can claim to be an innocent holder so as to preclude any defense that the maker might put in against the payee.

6th. If Yeldell traded the note sued on after it was due, Atkins has the right to make any defense to the note sued on by Knight, that he could have made if sued by Yeldell, the payee."

The court refused to give each charge asked by defendant, and to each refusal defendant excepted, and here assigns as error—

1st. Sustaining the demurrer to special plea.

2d. Charge given by the court.

3d. Refusal to give the charges asked.

HERBERT & BUELL, for appellant.—The charge of the court, as applied to the bill of exceptions, involves two questions :

1. Could Yeldell, the payee, have recovered of Atkins ? The following authorities answer the question in the negative : Chitty on Bills, p. 92 ; *Armstrong v. Toler*, 11 Wheat. 259 ; *Ayer v. Hutchins*, 4 Mass. 370 ; *Hinds v. Chamberlain*, 6 N. H. 225 ; Pars. on Cont., 4th ed., vol. 2, note 4, p. 280 ; *Nellis v. Clark*, 20 Wend. 24 ; *Smith v. Hubbs*, 1 Fairfield, (Maine,) 71 ; *Hoover v. Pierce*, 27 Miss. 13 ; *Walker v. Gregory*, 36 Ala. 184 ; *Goudy v. Gebhart*, 1 Ohio St. Rep. 363.

Smith v. Hubbs, *Hoover v. Pierce*, and *Nellis v. Clark*, *supra*, are all well considered opinions, holding that where a note is given with the intention of defrauding third parties, the holder may nevertheless prove the fraud as a defense, because a note is an *executory* contract, not to be enforced if tainted with fraud. Such proof was heard in *Walker v. Gregory*, *supra*. There the note on its face showed a good consideration, but R. W. WALKER, J., delivering the opinion of the court, says : " If the *proof* showed that the real consideration of the contract was future cohabitation, then it was to be read as though it recited that consideration."

2. Can Knight, who took the note more than twelve months after maturity, claim to be an innocent purchaser

without notice? The following authorities show that he took it subject to all defenses the maker might have set up against the payee: Story on Prom. Notes, § 190; Chitty on Bills, 244, 115; *Sebring v. Van Wyck*, 1 Johns. Cas. 330; *Odiorne v. Howard*, 10 N. H. 343; *Lansing v. Lansing*, 8 Johns. 454; *Ayer v. Hutchins*, 4 Mass. 370.

The established rule is, that he who takes paper past due, is charged with notice of all he might have learned by making proper inquiry. GOLDTHWAITE, J., says, in *Robertson v. Breedlove*, 7 Port. 543, such paper is "subject to all objections in respect of want of consideration or illegality, and all other objections," &c.

Examining the cases relied on by appellee, we find *Lickman v. Lapsley*, 13 Sgt. & Rawle, 224. No transfer had given pretended validity to the note, and it is held that one party can not set up his fraud against the other. In other words, the court, because it hated fraud, enforced a fraudulent executory contract, thereby making itself the instrument of fraud. We have no fear this court will do that. The case is unsupported by authority, and totally at war with principle.

Administrator of Wilson v. Greene, 25 Vt. 456, is the case of an executed fraudulent contract, which the court refused to disturb.

Thomas v. Page & Page, 3 McLean, 369: The report of the case does not show *when* the note was transferred, and we must presume the transfer was before maturity. In fact, the very next case in the same volume, 3 McLean, 371, shows what would have been the decision in *Thomas v. Page*, had the note been transferred after maturity. There they say a person who took over-due paper "should have made inquiry," &c.

Decatur Bank v. Spence, 9 Ala. 800; *Roberts v. Adams*, 8 Port. 300; *Herbert v. Huie*, 1 Ala.; *Huntingdon v. Branch Bank*, 3 Ala. 188: These are all cases in which one party entrusts another with the filling up of a note signed in blank. In none of them is it made to appear that the paper was negotiated after it became due. Hence, the doctrine of estoppel properly applies. The party who has

put it in the power of another to mislead a third person, is estopped to set up that the note was filled up with a larger amount than he authorized. But if the notes had been traded after maturity, and the persons taking them thereby put on inquiry, we apprehend the decisions would have been different. There is, however, this other difference: the question in these cases was not one of consideration, which may generally be inquired into, but of amount agreed to be paid, as to which, generally, parol evidence is inadmissible to vary a written contract.

Rhodes v. Starr, 7 Ala. 346, that the contract for the sale of lands was executed, vendee having been put in possession and waived deed.

T. J. JUDGE, and T. H. WATTS, *contra*.—The demurrer to the special plea was properly sustained—1st, because this special plea amounted to nothing more than the general issue, or if it did, the same proof could have been given under the general issue, under the agreement shown in the judgment entry; 2d, because the matters set forth in said special plea constituted no valid defense to the plaintiff's right of recovery. There was no averment in the plea that the assignee of Yeldell, or his creditors, claimed the note sued on as assets of Yeldell's bankrupt estate; 3d, because all the material matters set forth in the plea occurred *subsequent* to the commencement of this suit; 4th, as this plea is based on facts occurring after the commencement of the action, it could, under no circumstances, have been held a good plea, unless pleaded as a plea *puis darrein continuance*.

3. The charge given was correct. To hold the reverse, would be to allow Atkins, the appellant, to take advantage of his own fraud and that of the payee of the note, concocted between them, against an innocent man, who paid value for the note without notice of their combination to defraud. Atkins, by making the note in concert with Yeldell, for the purpose of practising a fraud on a third party, put it in the power of Yeldell to transfer it to an innocent party and thus practice a fraud on him, if one of these

conspirators in fraud can now set up this fraud (not practiced on him,) in defense of this suit.

It matters not, in this view of the case, whether Knight became the holder of this note before or after maturity. Where two conspire to perpetrate a fraud on a third party, by one making a note payable to the other conspirator in fraud, and the note is then put off on a party without notice, paying value, neither of the conspirators in such a fraud can set up his own fraud and that of his co-conspirator to defeat the rights of the innocent victim of the fraud.

The principles of the following cases support this view: *Lickman v. Lapsley*, 13 Serg. & R. (Penn.) 224; *Administrator of Wilson v. Greene*, 25 Vt., especially on page 456; *Thomas v. Page & Page*, 3 McLean, 369.

This last case is almost precisely in point, and was decided by Judge McLean, of the United States supreme court. "The maxim that fraud vitiates every contract, is always applied *ad hominem*, that is, to the party on whom the fraud is committed," and does not apply to a case where two combine to perpetrate fraud on a third person, so as to permit one of the two participators in the fraud to set up the fraud of himself and co-conspirator, as between themselves, to defeat the innocent victim of their fraud in recovering his just rights when he was one of these conspirators in fraud.—See *Lickman v. Lapsley*, *supra*.

The general doctrine may be, that the defendant may set up against the assignee of a note the same defense he could against the payee; but where persons mutually engage to defraud another, and the note intended to be the instrument of the fraud come into the hands of an innocent assignee, who pays value for it, the original fraud can not be set up as a defense against the assignee.—See *Thomas v. Page & Page*, *supra*. The facts of the present case are strikingly like those of the case referred to.

Where a party's own agent is authorized to fill up a note in blank, and the agent puts in a larger sum than authorized, the maker is bound to pay to a holder for

value, and can not set up the fraud of the agent. These decisions rest on the ground that he who is most in fault must suffer.—9 Ala. 800; 8 Porter 300; 1 Ala. 18; 3 Ala. 188.

5. But under the facts disclosed in this bill of exceptions, Atkins and Yeldell, as to third parties ignorant of the understanding between them, must be regarded as the makers of this note. In *Murdock v. Carruthers*, 21 Ala. 785, it is held that a note made by one firm payable to another firm having a common member, is not a note until assigned, and the assignee is regarded as the payee. Why is this? It is because there was no contract completed until the assignment of the note; one man being a member of each firm, destroyed the idea that there would be two parties to the contract until the note was traded to the assignee, who was the second party to the contract, and hence he was regarded as the payee, although on the face of the paper he was the assignee.

In this case, Atkins and Yeldell, both parties to the fraud, constituted one party, and Donald, the first assignee, constituted the second party to the contract. He had no notice of the secret understanding between Yeldell and Atkins; he paid his money without notice, and must be protected if he had sued. Knight stands in his shoes. In this aspect of the case, the note was not due until one day after Donald became the owner of it. He, in fact, in this view of the contract, became the owner of the note before maturity.

6. When the consideration of a note is expressed specially on its face, parol evidence can not be introduced to show a different consideration, and that the contract has been rescinded.—See *Newton v. Jackson*, 23 Ala. 355; *West v. Kelly*, 19 Ala. 353; *Evans v. Bell*, 20 Ala. 509; *Saunders v. Bacon*, 8 John. 485.

7. This note was an unconditional promise to pay, and the defendant can not set up a cotemporaneous agreement, whether verbal or written, to defeat a recovery against one who paid value for the note, without notice of such secret agreement.—See authorities cited in preceding point, and

also, *Gillett v. Ballou*, 29 Vermont, 298; see opinion of the court, and not merely the head note; *Jones v. Jeffries*, 17 Missouri, p. 578.

8. The authorities cited to show that a party who trades for over due paper takes it subject to equities between the original parties, have no application to such a case as this. In all such cases an innocent party is allowed to set up the fraud of payee imposed on him. No case can be found which holds that where both the maker and payee of a note combine to cheat somebody else, that the maker of a note can set up his and the payee's bond to defeat the assignee for value, whether the assignee became so before or after maturity of such paper.

B. F. SAFFOLD, J.—The defendant, Atkins, was at liberty to buy a set-off against his note to Dr. Herbert, but the purchase should have been absolute, not conditional. As he was to pay Yeldell only in case he made the claims against Herbert available, he had no such property in them as would entitle him to use them as a set-off.—*McDade v. Mead*, 18 Ala. 214. His fraud consisted in concealing the conditional character of the purchase, and in ante-dating the agreement, for the purpose of precluding Herbert's right to transfer or sue on his demand.

Assuming that Atkins' note was given with the understanding expressed in Yeldell's receipt, and that the consideration has not been realized, the latter could not recover on it. If the plaintiff, obtaining the note after its maturity, occupies a better position than the payee, it must be on account of some fraud from which he is likely to suffer, and against which he was not warned either actually or constructively.

The consideration of a promissory note may be inquired into, for the purpose of a defense to an action brought thereon, between any of the immediate or original parties to the contract. The rule applies to all cases where the party takes the note, even for value, after it is over due; for then he takes it subject to all the equities which properly attach to the particular note between the antecedent

parties. The test of such an equity is, could the payee, at the time he transferred the note, have maintained a suit upon it against the maker, if it had then been mature. Story on Prom. Notes, §§ 178, 190. A note in circulation after it is due, carries suspicion upon its face. It suggests inquiry, and places the purchaser in privity with his indorser, and subject to any defense available against him. *Sylvester v. Crapo*, 15 Pick. 92; *Burroughs v. Moss*, 10 Barn. & Cresw. 563. It is better to require one who would purchase a negotiable note after its maturity to ascertain whether it is a subsisting demand, than to subject the antecedent parties to the necessity of tracing to him a knowledge that it is not.

The question in this case is not whether the defendant's intended fraud shall shield him from liability, but whether, notwithstanding it, he shall be protected. Contracts in fraud of the rights and interests of third persons are void against them, but not necessarily always so between the parties or their privies, especially when not in *pari delicto*. For instance, if Atkins had purchased the claims upon Herbert absolutely, after the commencement of the suit against him by Dunklin, and ante-dated the contract of purchase in order to make them available as an offset, he could not defeat the suit of an innocent purchaser, though after maturity, on the note given for them, on the ground of the attendant fraud. In such a case there would be neither want nor failure of consideration, and the fraud would be such as the perpetrator would not be allowed to take advantage of.—*Abner v. Kingsland & Co.*, 10 Ala. 355; *Troughton v. Johnston*, 2 Hay, (N. C.) 328.

Our conclusion is that the charge given by the court was erroneous; the first, second and fourth charges asked by the defendant were properly refused; and that the third, fifth and sixth charges refused ought to have been given.

The plea to which the demurrer was sustained, was in substance merely the suggestion of another claimant of the money sought to be recovered, without a request for an interpleader. Besides, it was not pleaded *puis darrein continuance*, the matter alleged having occurred after the

commencement of the suit. The demurrer was well sustained.—*Agee v. Medlock*, 25 Ala. 281.

The judgment is reversed and the cause remanded.

WARREN *vs.* THE STATE.

[INDICTMENT FOR CARRYING ON, SETTING UP, OR BEING CONCERNED IN A LOTTERY.]

1. *Charge asked verbally ; may be modified.*—A charge asked verbally is not required to be given in terms.
2. *Same ; as to the protection afforded by the charter of the Tuscaloosa Scientific and Art Association ;" what not erroneous.*—On the trial of a person indicted for carrying on a lottery without legislative authority, a charge that the use of printed or written refusals of the article drawn, and demands for the payment of their value in money, in pretended compliance with the charter of the Tuscaloosa Scientific and Art Association, but in real evasion of the law, will not give the defendant the protection of that charter, is correct.

APPEAL from City Court of Mobile.

Tried before Hon. C. F. MOULTON.

The appellant was tried and convicted on an indictment for setting up, or being concerned in setting up or carrying on a lottery, without legislative authority, &c.

None of the evidence is set out in the bill of exceptions, but it states that after the evidence had closed, and the general charge had been delivered to the jury, the counsel for the defendant verbally asked the court to charge the jury, "that under section 7 of the charter of the Tuscaloosa Scientific and Art Association, approved Feb. 3, 1866, the simple written refusal of the party drawing an award and asking for an appraisement of the article, which, by the certificate his number should be entitled to, entitled said party to demand and receive the value thereof in

Warren v. The State.

money." This charge the counsel declined to reduce to writing at the request of the court, and the court gave the charge in substance, but not in the exact language in which it was asked, and added the following explanation, viz: "the defendant would have the legal right of disposing by lot or chance, of any of the enumerated articles in the legislative grant; that an article so chosen would be the personal property of the winner, and he would be at liberty to dispose of it in any manner, and could sell or dispose of it, even to any one of the parties conducting the lottery. But if the jury believed from the evidence that the printed or written refusals on the back of the certificates sold, declining the acceptance of the articles, and requesting payment of the value in money, was a subterfuge on the part of the defendant to enable him and those carrying on the lottery to evade the law by such trick or evasion, then the defendant would not be entitled to protection under the act of February 3, 1866."

The qualification of the charge is now assigned as error.

HENRY ST. PAUL, for appellant.

ATTORNEY-GENERAL, *contra*.—1. The charge was asked orally, and the court properly refused to give it without qualification.—*Milner and Wife v. Wilson*, 45 Ala. 478; *Lyon & Co. v. Kent, Payne & Co.*, 45 Ala. 656.

2. The court did not err in the charge given in explanation of the one requested by defendant.—*Marks v. The State*, 45 Ala. 38.

B. F. SAFFOLD, J.—The appellant was convicted under an indictment for carrying on a lottery, without legislative authority of the State. His counsel declined to put in writing a charge asked, and the court gave it in substance, but added that if the printing, or writing on the back of the certificates sold, declining the articles drawn, and requesting the payment of the value in money, was intended as a subterfuge to evade the law, the defendant

Cogburn, Adm'r, v. McQueen.

would not be protected under the act incorporating the Tuskaloosa Scientific and Art Association.

The statute requiring charges asked to be given or refused in the terms written, applies only to such as are in writing.—Rev. Code, 2756; *Milner v. Wilson*, 45 Ala. 478.

The charge given was in conformity with *Marks v. The State*, 45 Ala. 38.

The judgment is affirmed.

COGBURN, ADM'R, vs. MCQUEEN.

[ACTION ON BILL OF EXCHANGE.]

1. *Executor ; what may not plead without alleging settlement, &c.*—No executor or administrator of a solvent estate can allege his resignation, removal, the revocation of his letters, or that his authority has ceased from any cause, in defense of an action, without an averment that he has settled his accounts, and delivered over the assets of the estate as required by law.
2. *Same ; what good plea in bar.*—But a plea that before the commencement of the suit, his authority had ceased, the estate had been declared insolvent, and an administrator *de bonis non* was appointed, would bar an action.
3. *Judgment against representative of estate ; when execution can not issue thereon.*—No execution can issue upon a judgment which is obtained against the representative, after a declaration of insolvency.
4. *Order removing administratrix ; when will be presumed to have been made.* In a collateral proceeding, an order removing an administratrix will be presumed to have been made when a citation has been served on her to appear and renew her bond, or show cause why she should not be removed ; and prior to the day appointed, she filed her accounts for a final settlement, and on the day set for the hearing, an administrator *de bonis non* was appointed, the settlement made, and a judgment for the balance in her hands rendered in favor of the administrator *de bonis non*.

(PECK, C. J., *dissenting*.)

APPEAL from the City Court of Montgomery.

Tried before Hon. THOS. M. ARRINGTON.

Cogburn, Adm'r, v. McQueen.

The suit was commenced by summons and complaint on the 20th day of April, 1868, and was founded on a bill of exchange for \$1385.66; which was drawn by a John H. Cogburn, in his lifetime, on and accepted by one Carr, and indorsed by said Carr to John W. McQueen, the plaintiff in the court below. After the making of the bill of exchange, said John H. Cogburn died; and said Nancy Cogburn was duly appointed the administratrix of his estate; and in this character she is sued by McQueen, in this action. In answer to the complaint she pleaded seven pleas, by leave of the court. But it is only necessary to set out the fourth and fifth pleas, as it was upon the matter of these pleas that the cause principally turned on the trial. These pleas are in the following words, viz:

"4. And the said defendant saith that after the commencement of said suit, the said defendant, by the judgment of the probate court of Montgomery county, was removed from the administration of the estate of John H. Cogburn, and John C. Nicholson and H. C. Alford were appointed and qualified administrators *de bonis non* of said estate; and defendant avers that after said appointment, by the judgment and decree of said probate court, said estate was declared insolvent; and defendant avers that said decree still remained in full force, and that said estate was at the time of the rendition of said decree, and is now insolvent, and that all the assets of said estate were not, and are not sufficient to pay the debts of said estate; and defendant avers that after said decree of insolvency was rendered, the said John C. Nicholson and Hamlin C. Alford were continued by said probate court as administrators of said insolvent estate."

"5. And the said defendant saith, that after commencement of said suit, the said defendant, by the action of the probate court of Montgomery county, ceased to be the administratrix of the estate of John H. Cogburn, and John C. Nicholson and H. C. Alford were appointed and qualified administrators *de bonis non* of said estate, and defendant avers that after said appointment and acceptance thereof, by judgment and decree of said court, the said

estate was declared insolvent; and defendant avers that said decree still remains in full force, and that all the assets of said estate were and are insufficient to pay the debts thereof; and the defendant avers, that after said decree of insolvency was rendered, the said John C. Nicholson and H. C. Alford were continued by said probate court as administrators of said insolvent estate."

These pleas were demurred to by the plaintiff, but it does not appear that any special causes of demurrer were assigned. The demurrers were sustained; and the defendant went to trial upon other pleas, which alleged, with more or less particularity, that the said Nancy Cogburn, as such administratrix as aforesaid, had "made a full and final settlement of her administration of the estate of the said John H. Cogburn, deceased, in the probate court of Montgomery county, and on said settlement there was found against her a balance in her hands of the sum of ———; and afterwards, to-wit, on the ——— day of ———, John C. Nicholson and Hamlin C. Alford were appointed administrators *de bonis non* of the estate of the said John H. Cogburn in her stead, and duly qualified and took upon themselves the administration of said estate of said John H. Cogburn, and then and there, by the judgment and decree of said probate court, recovered a judgment against this defendant for the sum of ——— dollars the balance found in her hands unadministered as aforesaid, whereby the said defendant was discharged of the further administration of the estate of the said John H. Cogburn, deceased." The evidence afforded by the record of the probate court of the settlement of Mrs. Cogburn, and the appointment of her successors, was rejected by the court below, as appears in the opinion of this court; she excepted, and there was a verdict and judgment against her. The other material facts of this case are so fully set forth in the opinion of the court as to make their repetition here useless. From the judgment of the city court Mrs. Cogburn appeals to this court, and relies upon the sustaining of said demurrers, and the rejection of the evidence offered by her in support of her pleas as errors.

Cogburn, Adm'x, v. McQueen.

MARTIN & SAYRE, for appellant.—Do these facts, set forth in the pleas, if established, constitute a defense to the action?

If an administrator resigns, it is a defense to the action if the plea avers a full settlement of the estate; and this provision was made upon the idea that the estate is solvent, and to prevent administrators from postponing judgments by repeated resignations, and upon the idea that all the property of a solvent estate is subject to the debts of the estate, whether in the hands of one administrator or the other; and section 2284 gives the right to prosecute the suit against the succeeding administrators.—*Skinner v. Frierson et al.*, 8 Ala. 917. This is based on the idea that the resigning administrator is still administrator as to assets remaining in his hands.

It is optional with a plaintiff which part of the assets he will pursue.

He is seeking no recovery against a defendant personally, but only to charge the assets of the estate with the payment of his debt.

This burden of alleging that the assets have been turned over, is only applicable to resigning administrators. Section 2029 gives the judge of probate power to remove, and from the instant of removal he ceases to be administrator, not by his own act but by the act of the court. He is, after his removal, no more administrator than if he was dead; and the suit, unless revived against his successor, must abate.

The distinction between the cases is plain. A resigning administrator, by the express provision of law, is continued administrator, unless he complies with the law by making a full settlement, turning over all assets, &c.

His continuing liability is created by law, and would not exist but for the law.

There is no such provision as to administrators who cease to be such from any other cause. Against them a judgment is rendered personally in the probate court.—Rev. Code, § 2233.

But the 3d, 4th, 5th and 6th pleas, contain other allegations which amount to a full defense to the action.

That is, that the estate was decreed to be insolvent by the probate court of Montgomery county.

Sections 2207-8, of the Revised Code, authorize administrators, in the progress of any suit, to show that the estate had been declared insolvent—and although judgment may be rendered for the debt, it cannot be enforced by execution.—§ 2209.

It is immaterial to creditors of an insolvent estate, under whose administration it became so. If the conduct of the administrator has been such as to bring on the insolvency of the estate, that don't prevent the insolvency of the estate—and the question of the liability of the administrator declaring the estate insolvent, must be tried and ascertained upon the settlement made by him.

The effect of a judgment against an administrator is to render the assets of the estate in his hands subject to execution. The judgment against Mrs. Cogburn rendered any assets in her hands liable to execution.

The effect of a decree of insolvency is to prevent the assets of an estate from being subject to execution. The creditor can only obtain such dividend as may be allowed by the court.

All other appointments are revoked by the decree of insolvency, and the property of the estate is vested in the administrator then appointed.

Section 2238 must be controlled by section 2195. Section 2238 is only applicable to solvent estates. Section 2238 has reference only to proceedings under chapter 9—and that chapter has no reference to insolvent estates.

An estate can not be solvent as to one creditor, and insolvent as to another; and yet, if the judgment of the court be correct as to McQueen, the estate is solvent, and to all others it may be insolvent.

The 7th plea presents the simple question, that the estate of Cogburn was declared insolvent; that the claim sued on was due at the time when the estate was so declared, and

that said claim was not filed in accordance with law, within nine months after the rendition of the decree.

The court recognized by its action, the fact that she had ceased to be administrator; she, by making no objection, admitted it; and the successors recognized it by making application for letters of administration.

Whenever citation issues and no answer is made, and other administrators are appointed, it is presumed, although not shown by the records, that the proper action was taken by the court.

The object of the citation was to force the administratrix to make a new bond. The records do not show that any bond was given by her, or any reason for not giving it made. The necessary result was, that she must cease to be administratrix; and that she did cease to be administratrix, is abundantly shown by the appointment of successors, and the judgment in their favor against her.

The citation does not, upon its face, appear to be placed upon the petition filed by Nicholson; that petition may have aroused the suspicions of the judge, and have determined him to act in accordance with the power given him by sections 2029, 2030.

Under the authority conferred by these sections, the judge was not bound to assign any reasons, or to make any order in the premises; removal, or no removal, is the result.

The law does not designate what evidence of this result shall be furnished by the judge. But the records in this case furnish the highest and best evidence that action was taken.

Section 2014 of the Revised Code makes letters of administration, until revoked, conclusive evidence of the authority of the administrator. *Before* the Code, there was no such law.

Sections 2044, 2233, 2237, show that when an administrator is removed, a successor must be appointed, and a decree rendered in favor of the successor. All of which the record shows was done in this case.

The citation in the record is evidently based upon sec-

tion 2029, and the application of Nicholson was a sufficient cause or reason for the action of the judge.

The probate court is a court of general jurisdiction in the matter of the grant of letters of administration.—*Grey's Adm'r v. Cruik*, 36 Ala. 559.

The fact that there was no removal must be affirmatively shown; and it will not be inferred that there was no removal, because the record does not show, in so many words, an order making the removal.—*Ikelheimer v. Chapman's Adm'r*, 32 Ala. 680; *ib.* 194, 195, 203, 207, 208.

The fact that the court appointed an administrator *de bonis non*, is of itself *prima facie* evidence that there was a vacancy in the administration, and will be held conclusive until it is clearly and explicitly disproved.—36 Ala. 563. And the record would be considered as amended, for the purpose of upholding the proceedings.—*Ragland v. King's Adm'r*, 37 Ala. 83; *Moseley's Adm'r v. Martin*, *ib.* 219; *Herbert v. Hancock*, 16 Ala. 591; *Speight v. Knight*, 11 Ala. 464.

The entry of record in the orphans court, that administration of an estate has been granted, is conclusive to show that all the pre-requisites of the law have been complied with.—*Eslava v. Elliott's Adm'r*, 15 Ala. 265.

Matthews, adm'r, v. Douthitt et al., 27 Ala. 273, is in harmony with all these decisions.

This decision is to this extent only: that a decree of final settlement, and a discharge of the administrator, within eighteen months after grant of letters of administration, was void, and that, consequently, the appointment of an administrator *de bonis non* after such a decree, was void. The record shows, in such case, that there was no vacancy, and shows it affirmatively. And irregularities do not render the order void.—*Fields' Heirs v. Goldsby*, 28 Ala. 217.

In collateral attacks upon judgments of courts having general jurisdiction of the subject matter, the attacking party must show affirmatively that the court had no jurisdiction. For instance, if letters were granted on the estate of A, it might be shown, in a collateral proceeding,

Cogburn, Adm'r, v. McQueen.

that A was not dead.—*Miller v. Jones*, adm'r, 26 Ala. 259; *Coltart v. Allen*, 40 Ala. 156.

So, in this case, the question is not whether the record shows, in so many words, that Mrs. Cogburn was removed from her administration, but it is the fact, whether she was removed. Did she cease to be administratrix?—*Sims v. Boynton*, 32 Ala. 360; *Bradley v. Broughton*, 34 Ala. 705; *Clemens v. Walker et al.*, 40 Ala. 199.

The evidence of insolvency, excluded by the court, was clearly admissible under the pleas.

STONE, CLOPTON & CLANTON, *contra*.—Is the averment in a plea of the removal of an administrator by the probate court, without more, sufficient?

It is contended by the appellant's counsel, that the burden of alleging that the assets have been turned over to the succeeding administrator, is applicable only to *resigning* administrators. It is true that section 2297 of the Revised Code speaks only of resignation. But why is this? At the common law, an administrator could not resign, but could be removed. By section 2039, Revised Code, an administrator was authorized to resign, and, in this respect, there was a change of the common law; and then section 2279 was adopted to regulate his liability in suits pending at the time of his resignation; that is, he must, in his plea, accompany his allegation of his resignation with an averment, that he had settled the accounts, and delivered over the assets of the estate, &c.

There being no statute prescribing the necessary averments in a plea to a pending suit, in case of the removal of an administrator, the same material averments are required as at common law. At common law, in cases where the administration was revoked, pending the suit, although the revocation might be pleaded in discharge of the action, it was necessary for the plea to allege an administration of the effects, or that *they had been delivered to the succeeding administrator*.—*Driver v. Riddle*, 8 Por. 343. Section 2279 was designed to make, in the case of a resigning administrator, the same averments in the plea

necessary, which were necessary at common law in case of a removed administrator.

Hence, whether the plea avers a removal or resignation, or, in general terms, as in some of the pleas, that the defendant had ceased to be administratrix, it is defective, unless it also avers, either an administration of the effects, or, that they had been turned over as required by law.

Those pleas which do not show how the administration was terminated, whether by death, resignation or removal, are clearly defective. Pleas are always construed most strongly against the pleader. It is necessary for the plea to show that the administration was legally terminated, for that is the gravamen of the defense. The burden can not be cast upon the plaintiff to reply how the administration terminated. An administration can only be terminated by death, resignation, removal, or full administration and settlement; and, if the defendant seeks to avail himself of the termination of the administration as a defense to a pending suit, he must aver, specifically, how it terminated, so that the court can determine on the face of the plea whether it has terminated. In other words, the plea must contain every averment necessary to the validity of the defense.

Next. Is the declaration of insolvency a valid defense in this suit, and for this defendant, Mrs. Cogburn? Did the declaration of insolvency affect the issues between these parties?

The suit was commenced against Mrs. Cogburn whilst she was administratrix. There was no defense to the note sued upon—no denial that it was a valid claim against the estate. The issue, in whatever different forms presented, was, that pending the suit Mrs. Cogburn had been legally discharged from the administration, and was not liable to a judgment. This issue involved two enquiries: 1. Had she been removed? 2. Had she delivered the assets to the succeeding administrators? This issue did not involve the declaration of the insolvency of the estate by the succeeding administrators. It was an enquiry into the fullness and completeness of her alleged final settlement made

Cogburn, Adm'r, v. McQueen.

with the administrators *de bonis non*, and upon which settlement the creditors had no right to be heard, as they were not, and could not have been, parties to it. This suit was the only means by which McQueen, a creditor, could charge the administratrix personally, and the issue was, had the assets been administered *by her*, in due course of law; not by the succeeding administrators. If she had administered them in due course of law, she was not personally liable; if she had not, she was.

The object of a suit against an administrator is to obtain satisfaction, and the general effect of it is to charge the assets of the estate, but beyond this, the judgment has the effect, also, to charge the administrator personally, as well as his sureties, unless the assets are administered in due course of law. As an administrator can be made responsible only because of a debt due from his intestate, it is necessary to ascertain that fact by a suit against him as the representative of the estate, before he can be made personally liable."—*Skinner v. Frierson & Crow*, 8 Ala. 917. In the same case, it is held, that the plaintiff is not compelled to make the succeeding administrator a party, though it is his privilege to do so, if he chooses. He may proceed with his suit, although the resignation, (or removal, as the case may be,) is suggested and shown, unless the administrator shows, either a due administration or a transfer of all the assets to the succeeding administrator; and that it is the right of the plaintiff to controvert these facts.

No one can plead the insolvency of the estate, except the acting administrator. This defense is purely statutory, and sections 2507 and 2208 speak of a suit against the executor or administrator. Nicholson and Alford were the administrators, and the estate was declared insolvent, by their application. It may have been insolvent in their hands, and not in the hands of Mrs. Cogburn. If it were otherwise, the outgoing and incoming administrators, by collusion, could defeat the creditor's rights.

It is not true that the judgment against Mrs. Cogburn would give McQueen a preference, as against the insolvent

estate, or interfere with the *pro rata* distribution of the assets. A judgment against Mrs. Cogburn, as administratrix, could not have the effect to charge the succeeding administrator. If McQueen desired to charge the assets of the estate in the hands of the succeeding administrators, the suggestion of the removal of Mrs. Cogburn should have been confessed, and the succeeding administrators made parties.—*Skinner v. Frierson & Crow*, 8 Ala. 819.

The judgment against Mrs. Cogburn, under the issue of her removal, and transfer of the assets to the succeeding administrators, has the object only to fix a personal liability upon her and her sureties. The same reasoning and authorities show, also, that the seventh plea presented an immaterial issue. Hence, we insist, that the demurrer to these pleas was properly sustained.

The most important question, however, involved in this case, and upon which depends the correctness of the charge given to the jury is, was the appointment of the administrators *de bonis non* void? We insist it was.

"It was essential to the validity of a grant of administration *de bonis non*, that the office should be vacant at the time of the appointment, by the death, resignation or removal of the preceding administrator."—*Rambo v. Wyatt's Adm'r*, 32 Ala. 363; *Matthews' Adm'r v. Douthitt and Wife*, 27 Ala. 273.

The validity of the grant of administration *de bonis non*, then, depends upon the *fact* of a vacancy.

The case of *Ikelheimer v. Chapman*, 32 Ala. 676, does not conflict with this principle, as asserted in the two cases above cited. This case decides that the jurisdiction of the probate court for the granting of letters of administration is original, unlimited and general; and hence it was not necessary that the order should recite any jurisdictional fact. The presumption is, the court had jurisdiction; but if it is made to appear by the records, or other legal proof, that there is no vacancy, then the court has no jurisdiction, and its action is invalid. This view harmonizes all the cases.

Had, then, Mrs. Cogburn been removed *at the time* Nich-

Cogburn, Adm'r, v. McQueen.

olson and Alford were appointed administrators *de bonis non*?

On the 23d day of February, 1867, Nicholson, as one of the sureties of Mrs. Cogburn, filed his petition to compel her to renew her bond.

In this respect, the probate court is a court of limited jurisdiction, and everything necessary to give it jurisdiction must appear upon the face of its proceedings.—*Gunn v. Howell*, 27 Ala. 663, and cases cited.

There is no application in writing, in the record, but the minute entry recites it, and the jurisdictional fact, as it is alleged in the application, is, that "his interest will be endangered by remaining on said bond." A moment's comparison will show that the fact alleged in the application does not comply with the statute, and is insufficient to give the court jurisdiction. The court being without jurisdiction, all subsequent proceedings are void, so far as based upon that application.

But admitting, for the sake of the argument, that the proceedings up to and including the citation were valid, yet we insist that the record shows there was no vacancy, upon the following facts:

1. No proceedings were had upon the application or citation subsequent to the issue of the citation. There never was any order of removal, or requiring an additional bond, or any action had by the court which amounted to the removal of Mrs. Cogburn. The proceedings to remove her were abandoned; upon the filing of her account for a final settlement, they were prosecuted no farther.

2. Her final settlement was not tantamount to a removal. This is in no case the effect of a final settlement, by itself. The removal precedes the final settlement; a final settlement is the consequence of a removal.—Revised Code, § 2232. A final settlement, without being preceded by a resignation or removal, is not a discharge of the administrator, unless there has been a full administration, and the estate is ready for distribution.

There was no proof, then, that any proceedings were

ever commenced to remove Nancy Cogburn, or that she has ever made a final settlement.

In the case of *Ragland v. King's Adm'r*, 37 Ala. 80, only a part of the record was in evidence—that portion which relates to the removal—and the minutes recited in the order, appointing the administrator *de bonis non*, the facts necessary to sustain an order of removal. The court considered this as amounting to a removal of the administratrix, and that they would consider the record as amended so as to show an order of removal. It is evident, that, in this case, the court, not controverting the principle established by former decisions, that, if there was no vacancy, the grant of administration *de bonis non* would be void, treated the question as a matter of *evidence* to ascertain whether there was a vacancy or not, and, upon the record before them, they would presume in favor of the action of the court; the court, being for granting administration, a court of original jurisdiction, upon the general principle, that all proper intendments will be made in favor of the judgments of courts of original jurisdiction. But these intendments are not made, when the record affirmatively shows that the fact intended, does not exist. The rule is, that those facts, which are necessary to sustain the judgment, will be presumed, although they are not expressly alleged in the record, *provided the record contains terms sufficiently general to comprehend them in fair and reasonable intendment*.—1 Greenleaf on Ev. section 19; *Townsend v. Jeffreys*, 17 Ala. 276; *Murray & Durand v. Tardy*, 19 Ala. 710; *Laws v. Norris*, 28 Ala. 675. The record in evidence in the case of *Ragland v. King's Adm'r*, did contain terms sufficiently general to comprehend the fact of removal in fair and reasonable intendment; and this was all, *in principle*, which the court decided. In the present case, the bill of exceptions states that all the record is before the court, and this record not only does not contain terms sufficiently general to comprehend the fact of removal in fair and reasonable intendment, but, on the contrary, affirmatively shows that there was no removal and no vacancy. In the case of *Ragland v. King*, the order of

Cogburn, Adm'r, v. McQueen.

appointing the administrator *de bonis non*, recited the facts necessary to sustain an order of removal, and thus there was enough in the record by which to amend. In the present case, the facts necessary to sustain an order of removal are not recited in the order appointing the administrators *de bonis non*, (page 261,) or any where else in the record, and hence, there are no terms from which to intend a removal, or by which to amend. Section 2014 only makes letters of administration conclusive evidence, when offered in a suit to show the right of the person to sue as such, and when granted by a court *having jurisdiction*; but leaves for contest the question of jurisdiction.

For these reasons, we insist that the appointment of the administrator *de bonis non* was void, and the charge of the court is correct.

We further suggest, that the record shows that Mrs. Cogburn was appointed administratrix; the presumption is, that she continues administratrix until the record also shows her resignation or removal.

When no evidence is before the court, but the *order* appointing an administrator *de bonis non*, then the court will pronounce that the probate court had jurisdiction to make the order. But, when the whole record is before the court, as in this case, and the record fails to show any resignation or removal, then no such presumption exists in favor of the jurisdiction. On the contrary, the presumption is in favor of the continued existence of the fact, that Mrs. Cogburn is administratrix.

B. F. SAFFOLD, J.—The appellant was sued by the appellee in 1866 on a bill of exchange, drawn by A. G. Carr, on, and accepted by her intestate, John H. Cogburn, payable twelve months after date to the order of Carr, who endorsed it to the plaintiff.

She pleaded seven pleas. Issue was joined on the first two, and a demurrer to the remainder was sustained. The bill was the evidence on the part of the plaintiff. The defendant introduced proceedings of the probate court, showing, among other things, her appointment as administratrix,

a citation to her, at the instance of Nicholson, one of her sureties, to give a new bond, the filing of her accounts for a final settlement, the appointment of Nicholson and Alford as administrators *de bonis non* of Cogburn's estate on the 20th of March, 1867, and the final settlement made by Mrs. Cogburn on the 25th of March, 1867. She next offered to prove that the administrators *de bonis non* had reported the estate insolvent, and it had been so declared; but the plaintiff objected, and the court excluded this evidence. There was evidence that Mrs. Cogburn had turned over to the administrators *de bonis non* the assets unadministered by her, but it was not shown how she ceased to be the administratrix.

No executor or administrator of a solvent estate can allege that he has resigned, or been removed, or that his letters have been revoked, or his authority has ceased from any cause, in defense to any action or proceeding, without an averment that he has settled his accounts, and delivered over the assets of the estate as required by law.—Revised Code, §§ 2279, 2238, 2232. But a plea, that before the commencement of the suit, his authority had ceased, the estate had been declared insolvent, and there was an administrator *de bonis non*, would bar the action, because the appointment of the latter would revoke any former grant of letters, and vest in him the property of the estate.—Revised Code, § 2195. Otherwise, a *pro rata* disposition of the property between the creditors would be defeated. If a suit is pending when the declaration of insolvency is made, judgment may be obtained, but it must be certified to the probate court.—Rev. Code, § 2209. No execution can issue upon a judgment which is obtained against the representative after a declaration of insolvency.

Tested by these propositions, none of the pleas could have prevented the plaintiff from obtaining a judgment; but the fourth and fifth, if sustained by the proof, would have entitled the defendant to have the judgment certified to the probate court.

The evidence of the declaration of insolvency was rejected, and on the evidence admitted, the court charged the

Cogburn, Adm'r, v. McQueen.

jury that they must find for the plaintiff. A judgment was accordingly rendered *de bonis intestatis*.

Whether there was error in rejecting the evidence above mentioned, or in the charge of the court, depends upon the validity of the appointment of the administrators *de bonis non*.

After the grant of letters of administration to Mrs. Cogburn, who was entitled to and capable of administering the trust, the probate court had no power to make any new appointment to the office until it was vacated by her death, resignation or removal. Unless there was a vacancy, the appointment of Nicholson and Alford was void.—*Matthews, adm'r, v. Douthitt*, 27 Ala. 273.

The transcript exhibits a citation to Mrs. Cogburn, issued February 23d, 1867, to renew her bond, or show cause why her letters shall not be revoked. This she was to do on the 18th of March, 1867. On the 25th of February, 1867, she filed her accounts for a final settlement. The 20th of March, 1867, was appointed for the settlement, a guardian *ad litem* was appointed for the minors, and publication in a newspaper ordered to be made. At the time appointed for the settlement, it was continued to the 25th of March, 1867, and Nicholson and Alford were appointed administrators *de bonis non*. On the 25th of March, 1867, the settlement was concluded, and a judgment rendered against Mrs. Cogburn in favor of the administrators *de bonis non*. It does not appear that any action was taken on the 18th of March, 1867, the day on which Mrs. Cogburn was to answer the citation, or that any court was held. There is no order for her removal. The bill of exceptions recites, that the proceedings of the probate court on this subject introduced, contained all the record which can now be found, but, that there was no proof that any part of said record was lost or destroyed.

In *Ragland v. King's Adm'r*, (37 Ala. 80), the sureties of a sheriff moved to supercede an execution issued against them on a decree of the probate court against their principal, as administrator *de bonis non*, on the ground that his appointment as such was void, the administrator-in-chief

having neither died, resigned, or been removed. The order appointing him alleged that the former administrator, having been notified to appear on that day and renew his bond, and failing and refusing to do so, the appointment of the sheriff is made. Another order recited that the appointment was made in consequence of the failure of the other to renew her bond. The court said: "Although there is no formal order for the removal of Mrs. King, yet the facts necessary to sustain such an order are recited in the minutes; and with the view of sustaining the second grant of administration, when collaterally assailed, we think it is proper to consider the action of the court as amounting to the removal of the administratrix. If the validity of the subsequent proceeding could not be otherwise upheld, we would consider the record as having been amended so as to show a regular order of removal."

In the case of *Matthews v. Douthitt*, *supra*, the administratrix had made application for a final settlement of her accounts. The settlement was made, and her debits and credits being found equal, she was formally discharged. Afterwards an administrator *de bonis non* was appointed, who cited her to a final settlement again. It was held that his appointment was void, because nothing was shown which amounted to a repeal of her authority. This case conflicts with the decision, in *Speight v. Knight*, (11 Ala. 461), that the appointment of a guardian cannot be collaterally assailed, as in a case where the former guardian sought to resist an application of his successor to require him to make a final settlement, on the ground that he had been displaced without notice, and for an insufficient reason. He was not removed otherwise than by the appointment of a successor.

Assuming the law to be as declared in the case of *Ragland v. King's Adm'r*, *supra*, we find the following inducements in favor of the validity of the administration *de bonis non*: 1st. The citation. 2d. The filing, by Mrs. Cogburn, of her accounts for a final settlement immediately afterwards. 3d. The application by Nicholson and Alford to be appointed administrators. 4th. Their appointment.

Cogburn, Adm'r, v. McQueen.

5th. The final settlement, and the decree against Mrs. C., in favor of her successors. 6th. The subsequent action of the successors, and of the court, in relation to the estate, and the acquiescence of Mrs. C. therein. These are strong reasons to "consider the record as having been amended so as to show a regular order of removal, to uphold the validity of the subsequent proceedings." But how else can the plaintiff prove that there was no vacancy, and that the subsequent appointment was void, than by showing the absence of any order of the court revoking the former grant. The full degree of the perplexity is admitted. On the one hand, the court may have omitted to record an order which was in fact made, and which other proceedings at the time, and subsequently, rendered indispensable to be made. To declare these void might be to work irreparable injury to the administratrix and her sureties, and involve the succeeding representatives and the creditors in difficulty. On the other hand, to presume the order made, cannot deprive the plaintiff of any valuable right. If the administrator has not accounted for all of the assets, or is guilty of waste, in which cases, alone, she and her sureties would be liable, she can be brought to account, either in the probate or chancery court. The probate court is one of general jurisdiction for the granting of letters of administration. When the predicate for the removal of the administrator was laid, by the citation to her to renew her bond, or show cause why she should not be removed, and subsequently to the day appointed for her to appear, other administrators were appointed, are we not authorized to assume in a collateral proceeding, that that was done, without which the succeeding action must be void?

We have given this case most careful consideration, and we decide that the court erred in sustaining the demurrer to the 4th and 5th pleas, and in rejecting the evidence of the declaration of insolvency of the estate of Cogburn.

The judgment is reversed and the cause remanded.

PECK, C. J., *dissenting*.

[NOTE BY REPORTER.—The opinion in this case was delivered at the June term, 1870.]

ALABAMA & FLORIDA RAILROAD COMPANY vs.
BURKETT.

[PROCEEDING TO ASSESS DAMAGES TO LAND CONDEMNED FOR RIGHT OF WAY
FOR THE USE OF RAILROAD COMPANY.]

1. *Railroad company, charter of; creates a contract.*—The charter of a railroad company is a contract which is protected by clause 1, section 10, of article I. of the Constitution of the United States, unless the charter is by its terms repealable.
2. *Same; how can not be impaired.*—A State can not impair the obligation and privileges secured by such a charter, either by its constitution or its laws. The prohibition is on the State by whatever means it acts.
3. *Same; what not affected by.*—The twenty-fifth section of the first article, and the fifth section of the thirteenth article of the present constitution of the State do not operate upon railroad charters granted by the State before the adoption of the present constitution, unless such charters were made repealable when granted.
4. *Act of congress of August 4, 1852; when ceases to operate as a grant of the right of way.*—The act of congress of August 4, 1852, which grants to railroad companies the right of way over the public lands in the States where such lands lie, ceases to operate on said lands after they have been entered and purchased by the citizen; unless the railroad company, claiming such right of way, has located its roadway and filed a plat of the location of the same with commissioner of the general land office of the United States at Washington, in the manner required by said act of congress, before said entry is made.
5. *Alabama & Florida Railroad Company, 5th section of charter of; how requires damages to be assessed.*—The 5th section of the act to amend the charter of the Alabama & Florida Railroad Company, directs how the damages shall be assessed for lands condemned for the use of said company, and this section requires the jury making such assessment to take into consideration the probable advantages the owner of the lands condemned may derive from the construction of the road, in increasing the value of his lands.—Acts 1853-4, p. 258, § 5. *The principles enunciated in the 3d and 4th head-notes of Alabama & Florida Railroad Company v. Burkett, 42 Ala. p. 83, modified.*
6. *Same; what considerations can not enter into the assessment of damages.* But in making such assessment the jury can not take into consideration the possible damages that may arise from the killing of stock by the cars on said railroad, or the possible necessity of an increase in the quantity of fencing on said land. Such damages would be too remote, as they might never occur.

Alabama & Florida Railroad Company v. Burkett.

APPEAL from Circuit Court of Butler.

Tried before Hon. P. O. HARPER.

The facts are fully stated in the opinion.

HERBERT & BUELL and SAM'L F. RICE, for appellant.—The act of congress granting the right of way over the public lands of the United States to the railroad, is found in the 10th volume of United States Statutes at Large, page 28. It provides "that when a location for either of said railroads shall be selected, the proper officer of such road shall transmit to the commissioner of the general land office a correct plat of the survey of such road, together with the survey of sites for depots, before such selection shall become operative.—*Morgan's Adm'r v. Nelson's Adm'r*. 43 Ala. 593; *McKennon v. McLean*, 2 Dev. & Batt. 79; 4th Dev. & Batt. 173.

Now what is it that is to become *operative*? The selection. The selection, location and filing of the map, as required by the law, are all parts of one continuous transaction to be performed by the railroad company, and when the transaction becomes complete by the filing of the map the original selection it is that becomes operative. The doctrine of relation here finds its legitimate application. See authorities last above cited.

The charge refused was that if Burkett, knowing that the survey and location had been definitely made, entered the land before the filing of the map, then he could not recover, &c. Now, if the United States authorized the survey and location, or selection, to be made, with the understanding and upon the express contract that such selection, so made, was to become valid and operative when the map should be filed, then the inchoate right of the road had attached to the land when Burkett entered, and he could not by such entry deprive the road of the power to perfect this right. Burkett took subject to the right of the road, already conditionally attached.

The charge of the court is glaringly wrong in several

material and important respects. It violates some of the plainest and most just rules of law.

1. It is a fixed rule, that a party can have but one satisfaction; the law will not permit him to have two satisfactions for any matter or thing.—*McLane v. Miller*, 10 Ala. 856, and cases there cited.

2. It is also a rule, that “for damages indirectly resulting from the lawful acts of a chartered corporation,” (such, for instance, as the liability of live stock to be killed by the cars of a railroad company regularly running upon its road, and in the lawful exercise of its franchise,) “the law affords no remedy.” An opposite rule would be destructive to railroad corporations, and therefore highly injurious to the public.—*Rogers v. Ken. & Port. R. R. Co.*, 35 Maine, 319.

3. The law does not allow something for nothing. Nor does it allow in advance damages for what may never occur.

All the foregoing rules are violated by the charge of the court. For, if a railroad corporation has any right at all, it has the right to run its cars upon its road. If, from the exercise of this right, there arises a liability of live stock to be killed, this is clearly a species of “damages indirectly resulting from the lawful acts of a chartered corporation.” Such damages can not be considered in determining how much shall be paid to the owner of land (and also of live stock,) for the right of way of the road through his land. If it could, then it is certain the owner would get two satisfactions for the same thing. First, he would get satisfaction for the liability of his stock to be killed by the cars. After getting this, suppose none of his stock is killed, then he gets something for nothing. But suppose his stock is killed or injured, then, under sections 1401 and 1406 of the Revised Code, he is sure to get full compensation for the stock so killed or injured; and the corporation can not reduce the recovery in the suit for stock so killed or injured, by showing that the owner had been previously allowed damages for the liability of his stock to be killed

by the cars. The law would not allow any such proof in a suit for killing or injuring stock.

The true rule is this : the law does not in advance allow damages for the mere liability of live stock to be killed by railway cars. The law allows damages only for what has occurred, not for what may or may not occur—for what may never result in damage. This is the dictate of reason and justice. This rule is not repudiated by any decision known to us. But if it were, then this court ought to disregard such decision and stand by reason, justice, and the law.

The decision in *Ala. & Flor. R. R. v. Burkett*, reported in 42 Ala. 84. is manifestly wrong, in so far as it holds that the increased value of the lands can not be taken into consideration in assessing damages. All the authorities hold that a charter of this kind is a contract. If this be the case, not even a constitution subsequently adopted can destroy the rights given by that charter. This seems too plain to need a citation of authorities in support of the proposition.

WATTS & TROY, *contra*.—1. The charge given is fully supported by the decision of the court in this case when it was heretofore before this court.—See *Ala. & Flor. R. R. Co. v. Burkett*, 42 Ala. 83 ; and *M. & W. P. R. R. Co. v. Varner*, 19 Ala. 185.

This charge required the jury to assess the damage done at the time the grading was done. And it was the inconvenience to Burkett, and his liabilities to injury in consequence of the building of the road, that the jury might look to as tending to diminish the value of his land at that time.

Under this charge, no double damage could arise. There was no right given to the jury to assess damages for actual killing of stock, and hence the argument of counsel on this point is wholly untenable.

2. The charge asked was properly refused.

It disputed the right of Burkett to recover any damages whatever. It disputed the right of Burkett to the land.

The Railroad Company was estopped by its own pleadings of record from doing either. The application was to have damages assessed to Burkett for injury done him by the road. This application was made by the Railroad Company itself. And in this application, it alleged that Burkett was the owner of the land, and that he and it could not agree on the amount of damage.

3. But even if the Company were not thus estopped by the record from disputing Burkett's title to the land, and his right to damages against the Railroad Company, Burkett had a good title to the land before any right of the Railroad Company accrued. He purchased it from the United States, and paid his money for it, before any right vested in the Railroad Company. Under the act of congress, no right of way or other easement could vest in the Company until the proper officers of the Company transmitted to the commissioner of the general land office, at Washington City, a correct plat of the survey of said road, together with the survey of sites for depots. Until this was done, the "selection" did not "become operative;" and until this was done, the public lands were subject to entry and sale by the United States.—See Act of Congress, p. 28, vol. 10, U. S. Stat. at Large, § 3.

The facts in the bill of exceptions show that Burkett made the entry and paid his money to the United States nearly one month before the map of survey was filed in the general land office.

Burkett had no notice, as far as the bill of exceptions shows, of the survey of the route, and if he had, it would make no difference. He is, then, a purchaser for value, without notice. The Railroad Company claims as a mere gratuity, and must stand as a mere voluntary donee.

Now, the rule is well settled, that a purchaser for value from the vendor has a better right than a voluntary donee, unless the voluntary donee's rights have been perfected and fully consummated before the purchaser for value bought from the vendor. Now, even if the voluntary grant had been perfected, unless the purchaser for value had notice at the time of his purchase, his title is better

than that of the donee.—See 3d head-note to *Wilson v. Eddins*, 1 Ala. 237; *Stokes v. Jones*, 21 Ala. 731; *Carter v. Castleberry*, 5 Ala. 278.

The act of congress was intended to make a mere gratuity to railroad companies and others; and congress had the right to impose such conditions as it pleased. And the companies have no rights under the act until they have strictly complied with its provisions. Especially would this be so against a *bona fide* purchaser for value.

The reasoning in *Ala. & Flor. R. R. Co. v. Burkett*, is unanswerable in what is there decided as to the mode of assessing damages. It is unnecessary to cite authority to sustain that decision.

PETERS, J.—This is a proceeding to assess the damages sustained by appellee, (said Burkett,) for land condemned for the use of the said Alabama and Florida Railroad Company, which was instituted under the provisions of the act incorporating said company.—Pamph. Acts, 1849–1850, p. 173–176; Act No. 125, § 9; Pamph. Acts 1853–1854, p. 258–259; Act No. 401, § 5. There was a trial in the circuit court of Butler county at the fall term, 1869, when a verdict and judgment was rendered in favor of said Burkett for \$630 and costs. From this judgment said railroad company appeals to this court. And the errors here assigned arise upon the charge of the court given and the charge refused, as shown in the record.

The evidence in the court below tends to show that said Burkett owned one hundred and twenty acres of land, through which the railway of said company diagonally passes. It was also shown that Burkett had entered and purchased said land from the United States at the land office in the town of Greenville, in this State, under the graduation laws of the United States, on the first day of April, 1856; and that the survey of said railroad fixing definitely its location by final survey through appellee's land, had been made before the said first day of April, 1856, but the map showing said definite location of said railroad through said land had not been filed in the United

States land office at Washington until the first day of May, 1856, when it was so filed in strict conformity with all the requirements of an act of congress, approved Aug. 4, 1852, entitled "An act to grant the right of way to all rail and plank roads and macadamized turnpikes passing through the public land belonging to the United States."—(10 U. S. States at Large, pp. 28–29.) And that the said railroad company had strictly complied with all the requirements of said act of congress after said location thereof over said land, and that said railroad had been continuously in operation since the year 1860, when it was completed through said lands, and said lands were, when said railroad was first surveyed and located through them and continued to be until Burkett entered them, subject to sale at private entry under the law of the United States.

Upon this testimony, the court charged the jury, "that if they should find for the plaintiff, (Burkett,) under the preceding charge of the court, (this charge is not set out in the transcript,) then they must assess to the plaintiff the actual damage done to his land by the grading and running of the railroad through his land, taking into consideration the inconveniences arising from the fact that it was more difficult to go from one portion of the land to another, that more fencing was required, estimating the value of the land actually taken by the road, and also taking into consideration the fact that *defendant's* (plaintiff's?) stock were liable to be killed by the cars on the railroad, and that in making this estimate of the damage done, they were not at all to take into consideration for the purpose of reducing the amount of damages, the enhanced value of the land caused by building or prospect of building the said railroad, and that they must estimate the damages at the time when the grading was done, and give interest from that time." To this charge and every part of it said railroad company excepted.

The defendant, (said railroad company,) also asked the court to charge the jury, "that if the location of the road had been definitely made by survey along the line upon which it was finally constructed on plaintiff's land, while it

Alabama & Florida Railroad Company v. Burkett.

was public land of the United States and subject to sale at private entry, and if plaintiff after this location was so made by a final survey, knowing that it had been so made, entered the land at the United States land office, then the plaintiff can not recover in this action, although at the time he so entered it, the defendants had not filed in the United States land office at Washington a map of the definite location of said railroad, provided said defendant subsequently filed said map as required by the act of congress entitled as above set forth, and approved August 2, (4,) 1852." This charge the court refused, and defendant excepted.

These charges raise two questions, the latter of which will be first disposed of. The court properly refused the charge last above cited. This appears from the language of the *fourth* proviso to the act of congress above cited. It is in these words: "*Provided further*, That when a location for either of said railroads or plankroads, macadamized turnpikes, or sites for depots on the line of such road or roads, shall be selected, the proper officers of such road or roads shall transmit to the commissioner of the general land office a correct plat of the survey of said road or roads, together with the survey of sites for depots, before said such selection shall become operative."—10 U. S. Stat. at Large, p. 28, ch. lxxx, § 3. Here the entry was made on the first day of April, 1856, and the plat of the survey of the railroad was not transmitted to the commissioner of the general land office, as required by the act of congress, until the first day of May afterwards. This was too late to give the railroad company a preference over the purchaser from the United States to the land in controversy. The grant was not operative until the plat was transmitted to the commissioner at Washington. And if, in the mean time, the land was sold to the citizen before the railroad company had placed its affairs in a condition to be entitled to the right of way over it as public lands, then it became the private property of the citizen, and the national government lost its control over it, for the purposes of said act of congress. After this, congress had no power

to dispose of it.—Const. U. S. Art. V; Pasch. Const. U. S. p. 258, and notes. This *proviso* is a limit on the law of congress.—15 Pet. 445. The congressional grant of the right of way is in this language: “*Be it enacted, &c., That the right of way shall be, and is hereby granted, to all rail, plankroad or macadamized turnpike companies that are now, or that may be chartered within ten years hereafter, over and through any of the public lands of the United States over which any rail or plankroad, or macadamized turnpike are, or may be, authorized by an act of the legislature of the respective States in which public lands may be situated; and the said company or companies are hereby authorized to survey or mark through the public lands to be held by them for the track of said road, one hundred feet in width; Provided, That in cases where deep excavation or heavy embankment is required for the grade of such road, then at such places a greater width may be taken by said company, if necessary, not exceeding in the whole two hundred feet.*”—10 U. S. Stat. at Large, p. 28, ch. lxxx, § 1. Although this law gives a present right to pass over the public lands with a railroad, plankroad, or macadamized turnpike, this right ceases by the terms of the act as soon as the lands become private property. And this happens if the lands are entered by the citizen before this right becomes operative. This is the case in this instance. Then the court did not err in refusing the charge to this effect, above quoted.

But this cannot be said of the charge which was given and excepted to, as above shown. That charge cannot be supported. The section of the present constitution of the State, by which the citizen is protected in the use and in the right to his private property, declares “that private property shall not be taken or applied for public use, unless just compensation be made therefor; nor shall private property be taken for private use or for the use of corporations, other than municipal, without the consent of the owner; Provided, however, that laws may be made securing to persons or corporations the right of way over the lands of either persons or corporations and for works of

internal improvement, the right to establish depots, stations and turn-outs; but just compensation shall, in all cases, be first made to the owner."—Const. Ala. 1867, Art. 1, § 25. But this section and section 5 of article 13 of the present constitution, which greatly modifies the future laws upon such subjects, (Const. Ala. 1867, Art. xiii. § 5,) were not parts of the constitution of this State at the time the Alabama & Florida Railroad Company was incorporated. This charter is a contract made by the State with the incorporators, and as such it is protected in all the privileges granted by it, by the constitution of the United States. *Dartmouth College v. Woodward*, 4 Whea. 518, 629; *Bridge Proprietors v. Hoboken Company*, 1 Wall. 146, 147; *Micou v. Pres't & Directors Tallassee Bridge Company*, in Mss. June 2, 1871. The State cannot, therefore, impair the franchises secured by the charter, either by its constitution or by its laws. The prohibition is on "the State," which includes a prohibition both upon the legislature and the convention.—Const. U. S. Art. 1, § 10; Pasch. Const. U. S. p. 153 and notes. One of the sections of the charter of this company is as follows: "Be it enacted, &c., That in all cases where land is condemned to the use of said company, the jury, in assessing the damages sustained by the owner, shall take into consideration the increased value which will result to such lands from the construction of the road, and shall, before making the assessment, be sworn truly to enquire and assess the damages such owner may sustain, taking into consideration the probable advantages he may derive from the construction of the road, in increasing the value of his lands."—Pamph. Acts, 1853-4, pp. 258-59; Act No. 401, § 5; Pamph. Acts, 1849-50, p. 173; Act No. 125, § 9. It is now the better opinion, that the State legislature may permit such condemnation of lands belonging to the citizen, to the use of railroads, and may prescribe the mode of estimating the damage to the land thus subjected to the use of a railway company, if there is no prohibition in the State constitution which forbids it.—*Bloodgood v. Mohawk & Hudson Railroad Company*, 14 Wend. 51; S. C. 18 Wend. 9; 2 Amer. Railw. Cas. 421; *Rogers v.*

Kennebec & Portland Railroad Company, 35 Maine, 319; *Johnson v. Joilet, &c., Railroad Company*, 23 Ill. 202; *Bona-parte v. Camden & Amboy Railroad Company*, 1 Bald. C. C. 205.

Under the law of the charter of this road, all the owner of the land should be entitled to receive is, "just compensation." These terms imply something more liberal than the mere market price of the thing taken. They open the inquiry so as to include an estimate of the benefits as well as the injuries, and the adjustment of the difference between them. Compensation is an equitable term, and literally means the balancing of one thing against another. Webster's Dict. Unabr., word Compensation, p. 261. It imports something different from a mere payment of a sum of money for the injury done to the land. It looks to compensation on both sides. That is, a just balancing of the advantages against the disadvantages. The charge of the court, which was given and excepted to, was not in conformity with this construction of the statute law, which governs this case. It was therefore erroneous. But a different rule must govern in cases arising under charters granted since the adoption of the present constitution of the State.—Const. Ala. Art 1, § 25; Art. xiii., § 5.

The charge given was also vicious for another reason. By it the court directs the jury, in estimating the damages, they are to take into consideration that "more fencing was required" on the land, and the farther fact, that the "plaintiff's stock were liable to be killed by the cars on the railroad." Both these were injuries that might not occur. It has not been found necessary to fence railroads that pass through enclosures or farms. These additional fences are usually obviated by the simple contrivance of a pit, where the roadway crosses a fence or enclosure around a lot or farm. And it may also happen that no stock, the property of the plaintiff, may ever be killed by the cars on the railroad. And if it should be, there is another mode presented to recover damages for the injury thus occasioned.—Rev. Code, §§ 1399, 1400, 1401, 1406; *Nashville & Decatur Railroad Company v. Comans*, 45 Ala. 437. Besides, if dam-

Waldman v. Crommelin's Adm'r.

ages for such prospective killing and injury of stock should be allowed to be recovered in this way, and then again as the above cited statute prescribes, this would be a double satisfaction for the same injury, which would not be a just compensation for the property injured. A double satisfaction is not allowed.—*McLane v. Miller*, 10 Ala. 856. Moreover, such damages would be too remote.—*Sedgw. on Dam.* pp. 57, 58, 4th ed. It is by no means certain that they would ever be occasioned by the railroad.

The judgment of the court below is reversed and the cause is remanded for a new trial.

WALDMAN *vs.* CROMMELIN'S ADM'R.

[ACTION ON PROMISSORY NOTE.]

1. *Section 2704 of Revised Code ; exceptions in, to what applies.*—The exception to the general rule of the competency of witnesses, notwithstanding their interest in the suit or being parties to it, as enacted in section 2704 of the Revised Code, applies to transactions with, or statements by, a deceased executor or administrator, in suits by or against his successors in the administration.

APPEAL from the Circuit Court of Montgomery.
Tried before Hon. J. Q. SMITH.

The facts are sufficiently stated in the opinion.

RANDOLPH & GOLDTHWAITE, for appellants.
WATTS & TROY, *contra*.

(No briefs came into Reporter's hands.)

B. F. SAFFOLD, J.—The appellant objects to the exclusion of certain testimony in his behalf, given by his partner as to transactions with, and statements by, Thomas

Crommelin, the predecessor of the plaintiffs in the administration of the estate of Charles Crommelin. The note sued on was made by the appellant and his witness as partners, and was payable to Thomas Crommelin, adm'r. The evidence excluded tended to show that the defendant had paid a portion of the money to Thomas Crommelin himself, and the remainder to Robinson, at the request of the said Thomas Crommelin.

The spirit of section 2704 of the Revised Code is to retain the former rule of evidence in cases where an executor or administrator suing may be met by acts and declarations of his decedent of which he knows nothing, and is not presumed to know. The reason of the rule is as applicable to transactions with a deceased administrator or executor as to those with the decedent himself. To hold the contrary would be to complicate and embarrass the administration and settlement of estates without any sufficient cause. We therefore decide that there is no error in the exclusion of the testimony to which exception is taken.

The judgment is affirmed.

CITY OF TUSCUMBIA *vs.* LINDSAY.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN.]

1. *Acts of Congress of April 20th, 1818, and March 3d, 1817, construed.*

The acts of congress, approved April 20, 1818, and March 3, 1817, authorizing the reservation of ten sections in any one land district, in the Alabama and Mississippi territories, for the purpose of laying out and establishing towns thereon, did not donate any title or interest in the sections so reserved, to the State of Alabama, or the towns built upon them.

APPEAL from Chancery Court of Franklin.

Heard before Hon. WILLIAM SKINNER.

City of Tuscumbia v. Lindsay.

This is a bill filed by the appellant against the appellee, to enforce a vendor's lien in favor of the "City of Tuscumbia," for the purchase-money of certain lots in said city, formerly sold to the appellee, Mrs. Lindsay. The facts on which the defense rests show that the lots thus sold consisted of a part of "the commons on the north side of said city." And it is contended by the said appellee that said city authorities had no power to sell the lands composing said "commons," and that they cannot make a good and sufficient title to the same. The answer, also, shows that Mrs. Lindsay is, and always has been, "ready and willing to pay the full amount of said purchase-money for said lots, when the complainant is able to give her a *bona fide* and perfect legal title to said lots." There was no controversy about the facts, and the cause turned upon the authority of the city, under the acts of congress, to make said sale. These acts are fully noticed in the opinion. At the hearing, the chancellor dismissed the bill, and taxed the complainant, who is the appellant in this court, with the costs. For this decree, the said city appeals to this court.

GOLDTHWAITE, RICE & SEMPLE, for appellant.

R. C. BRICKELL, for appellee.

(No briefs came into Reporter's hands.)

B. F. SAFFOLD, J.—The appellant filed a bill to enforce the vendor's lien upon a lot in the city of Tuscumbia, sold to the appellee.

The answer admits the sale, and the non-payment of the purchase-money, but denies the right of appellant to make the sale, on account of want of title. The appellant claimed, under its charter, the usual authority over its streets and commons given to towns and cities for the general benefit of their citizens. It also sought to derive title to the lot in question, or power to dispose of it, under an act of congress, passed April 20, 1818.—Statutes U. S., vol. 3, p. 466. This act authorized the reservation of not

exceeding ten sections of land in any one land district, to be designated by the president of the United States, for the purpose of laying out and establishing towns thereon, to be laid off into lots, and offered for sale in the manner, and on the terms and conditions, prescribed in "An act to authorize the appointment of a surveyor for the lands in the northern part of the Mississippi territory, and the sale of certain lands therein described," approved March 3, 1817. This act, in section 5, authorized the president of the United States to cause the sections so reserved to be laid off into lots, under the direction of the surveyor. Plots of the survey were to be transmitted to the commissioner of the general land office, and the register of the land office. The lots were then to be offered for sale to the highest bidder, at public sale, at such time as the president should appoint by proclamation, and sold on the same terms and conditions, in every respect, (except as to the quantity of land) as have been, or may be, provided for the sale of the other public lands in the district; provided, no lot should be sold for less than six dollars an acre.—U. S. Stat., vol. 3, p. 375.

No other right, title, or ownership in the lot sold to the defendant, is alleged by the complainant, than is conferred by these two acts of congress, and its charter granted by the State. It is plain that the United States did not, by the acts referred to above, donate any title or interest in the sections of land reserved for the establishment of towns, to the State, or the towns built upon them. They were to be sold as other public lands, and the title to them was to remain in the United States until sold.

The decree is affirmed.

BIBB AND WIFE *vs.* CARPENTER, ADM'X.

[BILL IN EQUITY TO COMPEL SURETIES OF DECEASED GUARDIAN TO ACCOUNT, &C.]

1. *Bill in chancery; when demurrable for want of proper parties defendant.*
A bill filed to impeach a decree of the court of probate, on the final settlement of a guardian, or to charge the sureties of such guardian on his bond for funds which such guardian failed to account for on such settlement, is demurrable, for want of proper parties defendant, when it fails to make the administrator *de bonis non* of such guardian a party defendant, if within the jurisdiction, and the estate is not utterly worthless.
2. *Same; when without equity.*—A bill which shows that the guardian accounted regularly during his life for his ward's estate, but died before final settlement, and that the final settlement was made by his representative after death, and when the decree on such settlement seems regular on its face, is demurrable for want of equity, unless it shows that the decree was erroneous by reason of mistakes or fraud. A mere allegation that there were sums of money in the guardian's hands unaccounted for, without showing what they were, or fraud or mistake, is not enough to give equity jurisdiction.

APPEAL from Chancery Court of Greene.

Heard before Hon. A. W. DILLARD.

This is a bill filed by Bibb and wife, as complainants, to compel the sureties of Samuel T. Carpenter, deceased, as the guardian of Mrs. Bibb and her sister Annie, who died in 1865 or 1866, to account for and pay over to Mrs. Bibb certain alleged sums of money remaining in the hands of said guardian, unaccounted for, at his death in 1862, which belonged to her in her own right, and in right of her deceased sister. The bill shows that said Samuel T. Carpenter was legally appointed by the probate court of Greene county in this State, in the year 1856, guardian of Sarah V. C. Rea, subsequently married to Bibb, one of the complainants in this suit, and Annie Laura Rea, the sister of Mrs. Bibb, and that he gave bond, with Simeon Carpenter, Moses Rosser, Maclin N. Cockrell and John J. Carpenter

as his sureties. Mary M. A. Carpenter, the widow of Samuel T. Carpenter, deceased, was appointed administratrix of her husband's estate, in 1862; and the 8th day of September, 1862, she made final settlement of his guardianship to both the Misses Rea.

The balance in favor of Sarah, now Mrs. Bibb, was \$1,420.29, which amount was decreed to be paid over to her then guardian, James Carpenter, for the ward's use; and the balance in favor of Annie, who was then still living, was \$1,542.26, which was also decreed to be paid over to her guardian, said James Carpenter, for her use. After the death of Annie, said James Carpenter, her guardian, was appointed administrator of her estate on March 15, 1867, and made final settlement of his guardianship of her estate, when the balance found to be due the estate of the ward was \$652.16, and this he collected. At the same time, said James Carpenter, as the guardian of Miss Sarah V. C. Rea, made an annual settlement of his guardianship of her estate, which showed a balance due the ward at that date of \$556.71. At these last named settlements, credits were allowed to Samuel T. Carpenter, deceased, on the amounts decreed against his administratrix on her settlement of his guardianship, made on the 8th of September, 1862, of the sum of \$763.55 in each settlement, as of the date of these settlements. Sarah married Bibb in 1867, and on the 15th day of April, 1868, James Carpenter made final settlement in said probate court both of his administration of the estate of Annie L. Rea, deceased, and of his guardianship of Mrs. Bibb, and paid over the balance in his hands to Mrs. Bibb. There was no objection to these proceedings in the probate court. Mrs. Bibb is the only heir and distributee of the estate of Mrs. Annie L. Rea, deceased. The bill does not allege any mistakes, fraud, or irregularities, or errors, in the accounts and settlements sought to be opened and re-stated, nor does it make the personal representative of Samuel T. Carpenter, deceased, a party to the proceedings as defendant, or otherwise, but it is alleged that the estate of said Samuel

Bibb and Wife v. Carpenter, Adm'r.

T. Carpenter, deceased, had been declared insolvent, and that Thomas C. Clark was the administrator *de bonis non* of the estate of said Samuel T. Carpenter, deceased, the former administratrix having died.

The bill was demurred to for want of proper parties defendants, and for want of equity. The grounds of demurrer were, that the representative of Samuel T. Carpenter, deceased, and the representative of Annie L. Rea, deceased, were not made parties defendant to the suit, and that there was adequate remedy at law, and the bill did not allege the want of a sufficient remedy at law.

The demurrer was sustained, but the complainants had leave of the court to amend by making proper parties to the bill. This they declined to do, and the chancellor dismissed the bill absolutely. From this decree the complainants appeal to this court.

W. COLEMAN, and R. CRAWFORD, for appellant.

BLISS & SNEDECOR, *contra*.

(No brief came into Reporter's hands.)

PETERS, J.—We do not think that there was error in the decree of dismissal. The relief sought is against Samuel T. Carpenter as the guardian of Mrs. Bibb and her sister Annie, and requires an account between said Carpenter or his representative, "by charging him with all with which he ought to be charged with, and giving him credit with all which he is justly and legally entitled to." And this, too, after his guardianship had been closed by a final settlement, which was not impeached for fraud or mistakes or errors of any kind, and whilst the estate of said Carpenter was unsettled and his representative within the jurisdiction of the court. In such a case the administrator *de bonis non* is a proper and necessary party to the bill. The deceased representative was a party to be seriously effected by the decree. The estate of Samuel T. Carter, deceased, was not shown to be utterly worthless, and the sureties were bound only for what his estate failed

Conn v. Thornton, Adm'r,

to pay.—Revised Code, §§ 2450, 3359. The failure to make necessary parties to a bill is a fatal defect on demurrer—*Phillips v. Threadgill*, 37 Ala. 93.

Besides, in this case, the bill shows that there had been a final settlement of the guardianship, and that the funds remaining in the hands of the guardian at the final settlement had been disposed of after his death, or had passed into the hands of his successor in the guardianship, and there is no allegation of error, fraud or mistake. In such case, the decrees of the court of probate are to be treated as final—*Mosely v. Tuthill et al.*, June term, 1871.

The decree of the court below is affirmed at appellant's costs in this court and the court below.

CONN vs. THORNTON, ADM'X.

[ACTION ON PROMISSORY NOTE.]

1. *Writing; what is a valid promissory note.*—A writing in these words : "One day after date I promise to pay, or at my death, W. G. Conn or bearer, the sum of five hundred dollars for labor done by W. G. Conn for value received, this 11th day of December, 1860. W. R. THORNTON," is a valid promissory note.

APPEAL from the Circuit Court of Russell.
Tried before Hon. LITTLEBERRY STRANGE.

The appellant, as plaintiff, in his complaint claimed "of the defendant (the appellee) as administrator of Walker R. Thornton, deceased, the sum of five hundred dollars due by promissory note made by the said decedent in his life-time in these words : "One day after date I promise to pay, or at my death, W. G. Conn or bearer, the sum of five hundred dollars for labor done by W. G. Conn, for value received, this 11th day of December, 1860," which said

Conn v. Thornton, Adm'r.

sum of money is now due with interest thereon. There was a second count on an account stated.

The original, of which the recital in the complaint is an exact copy, was offered in evidence and its execution proved, but the court excluded it, at the instance of the defendant, on the ground that it was not a promissory note, and was void for uncertainty. From this ruling the appeal is taken.

L. W. MARTIN, for appellant.—1. The instrument or note which is the foundation of the suit, being set out *in hæc verba* in the first count of the complaint, that, and that alone, was admissible evidence under the first count. Whether or not the plaintiff was entitled to recover upon it, was a question that did not arise upon the introduction of the evidence.

2. The instrument offered is a promissory note, under our law and the decisions of our supreme court.—See Revised Code, § 1838; *Love v. Simmons*, 10 Ala. 113; *Plowman v. Riddle*, 7 Ala. R. 775; *Lane v. Kirkman*, Minor, 411; *Thaxton v. Edwards*, 1 Stewart, 524; *Watkins v. Canterbury*, 4 P. 415; *Armstrong v. Tate*, 8 Ala. R. 635; *Henry v. Gamble*, Minor, 15; *Irvin v. Nickols*, 5 S. & P. 189; *Goadin v. Brittain*, 1 S. & P. 282. The main feature of a promissory note is its negotiability.—Story on Pro. Notes, § 41, 4th ed., and under section 1838, Revised Code, there can be no doubt as to the negotiability of the instrument offered in evidence in this case. The various instruments described in the cases above cited as “notes,” are entitled to that character only from their negotiability.

3. The evidence offered was clearly admissible under the second count in the complaint.—*Gillaspie et al. v. Wesson*, 7 P. 454; *Catlin, Peeples & Co. v. Gilder's Ex'ors*, 3 A. R. 536; *Hawley v. Willis, Lang & Co.*, 5 P. 154; *Johnson v. Johnson*, Minor, 263; *Hopper v. Eiland*, 21 A. R. 714. It is certainly an acknowledgment of a sum due and a promise to pay, and there is nothing in its nature that would require it to be declared on specially.

The following brief was submitted on the part of the appellee; but there is no joinder in error on the record, and the name of appellee's counsel does not appear either in the brief or on the docket:

1. The instrument sued on in this case is not a promissory note, because it is not a promise to pay a certain sum of money at a certain time unconditionally.—Parsons on Contracts, page 210; Story on Promissory Notes, pages 28–32.

2. The instrument, if any thing, was a codicil to Thornton's will, it purporting to take effect after his death.—See 2 Veasey's Ch. Rep. p. 232. But is not such codicil, for want of proper execution and attestation, *supra*, and therefore void?

3. It was not an account stated, nor a promissory note; the promise being in the alternative to pay, if Thornton had been sued on it in his life-time, he could have avoided payment of the same entirely, because not due. If it was a promissory note intended, it was void for want of certainty; if a will, it was not properly executed. Neither is it an account stated, because it shows no account between the parties; neither does it show when made, or when due, nor the accounting between the parties. It is, therefore, a void instrument. The instrument sued on not specifying with certainty when due, is void for uncertainty. This principle is well settled in Story on Promissory Notes, pp. 28–32.

4. The considerations of the promise being “for work and labor done,” and “for value received,” renders it also void for want of consideration as well as for uncertainty. See Story on Prom. Notes, pp. 200–5.

5. Neither could the instrument be offered in evidence under the second count, because of its uncertainty. There must be a specified time when the balance is struck between the parties, or the demand estimated and the balance ascertained, as well as a specified time when said balance is due. This instrument shows neither, and is, therefore, void, and not proper evidence to go before the jury as evidence.

Wharton, Ex'r, v. Cunningham.

B. F. SAFFOLD, J.—Of the essential elements of a promissory note, one is, certainly, as to the time of payment. Here, the rule that what can be made certain is certain, is permitted to operate. A note payable within a limited time after a man's death, is sufficiently certain as to the time of payment, because an event must occur which will make this definite.—1 Pars. on Notes and Bills, pp. 40, 38, 39. A written promise to pay a certain sum of money at the death of a party to the instrument, or at a limited time after the death of such a party, or of a third person, is a valid promissory note; because it must inevitably become due at some future time, since all men must die, although the exact period is uncertain.—Story on Prom. Notes, § 27.

The judgment is reversed, and the cause remanded.

WHARTON, EX'R, vs. CUNNINGHAM.

[ACTION ON PROMISSORY NOTES.]

1. *Evidence must be relevant to issue.*—The evidence must be relevant to the issues, or some one of them. It must tend to prove the facts alleged in the pleas. Evidence by one of the parties to a contract, that a sum of money mentioned therein was *understood* by one only of the parties to the contract that it should be discharged by a payment in Confederate currency or treasury-notes, will not be competent under the issue on a plea that it was understood and agreed by *both* the parties to the contract that it might be discharged by a payment in Confederate currency or treasury-notes.
2. *Contract dischargeable by payment of Confederate money; measure of damages for breach of.*—In estimating the damages on a contract for payment of a sum of money in Confederate currency or treasury-notes, the true criterion is the value of the property sold, in lawful money, at the date of the sale, and not the value of the Confederate currency at the time the debt becomes due.
3. *Act of February 14, 1870; is constitutional and retroactive.*—A bill of exceptions signed by agreement of the parties on the 8th of June, 1869, before the passage of the "act relating to bills of exceptions," approved

February 14, 1870, is made good by that act. This law has a retroactive effect ; and it regulates a matter of practice and does not impair vested rights.

APPEAL from Circuit Court of Etowah.

Heard before Hon. W. L. WHITLOCK.

This is an action at law commenced by summons and complaint, issued on the 16th day of October, 1866. Wharton, executor, was plaintiff below, and Cunningham and others, were defendants. There was a judgment, on verdict, for the plaintiff, but for a much less sum than that claimed in the complaint. From this judgment said plaintiff takes this appeal. The other facts upon which the case turns are sufficiently set out in the opinion of the court.

There was a motion in this court to strike the bill of exceptions from the record, on the grounds that it had not been signed as required by the Revised Code, and was not saved by the provision of the act of February 14, 1870 "relating to bills of exceptions."

WALKER & MURPHEY, for appellants.—1. The motion to strike out the bill of exceptions should not prevail. It is not governed by the law of the Code. The act of the 14th February, 1870, "relating to bills of exceptions," gives it validity. This act, by its terms, is made to apply "to judgments heretofore rendered and bills of exceptions heretofore signed." This is the very language of the law. That this law is retrospective does not, on that account, make it unconstitutional and void. Retrospective laws are valid, unless they infringe the constitution by impairing the obligation of contracts, are *ex post facto*, or take property of the citizen without due process of law.—Revised Code, § 2760 ; Acts, 1869, 1870, p. 99 ; *Saterlee v. Matthewson*, 2 Peters, 380 ; Sedgwick on Stat. and Const. Law, 198, 202 ; Cooley's Const. Limit. p. 369, 370, 371, 373, 381, 375 ; *Colder v. Bell*, 3 Dall. 386 ; *Watson v. Mercer et al.*, 8 Peters, 88.

2. This statute affects only the remedy. It merely wipes

Wharton, Ex'r, v. Cunningham.

away an impediment to judicial proceedings, which tend to promote justice and the accomplishment of the wishes of the parties. It divests no vested right, which is founded on the agreement of the parties or a judgment of court or given by law. Such statutes in this State have never been regarded as vicious for want of conformity to the constitution. This abundantly appears from the cases mentioned below.—*Aldridge v. T. R. R. Co.*, 2 Stew. & Port. 199; *Bartlett v. Waring*, 2 Ala. 461; *Paxhall v. Whitsett*, 11 Ala. 472; *Bloodgood v. Camak*, 5 Stew. & Por. 226; Anonymous, 2 Stew. 228; *Curry v. Sanders*, 35 Ala. 280; *Daily v. Burke*, 28 Ala. 328; *Ex parte N. E. & S. W. Ala. R. R.*, 37 Ala. 679; *Page and Wife v. Matthews*, 4 Ala. 547; *Weaver's Exr's v. Weavers' Creditors*, 23 Ala. 789; *Coosa River Steamboat Co. v. Barclay & Henderson*, 30 Ala. 120; *Ex parte Pollard*, 40 Ala., *Dekman v. Stiple*, 8 Wall. 595; 10 How. 396; *Cooley Con. Lim.* p. 107.

3. Administrator's sale or executor's sale made by order of court can not be made for Confederate money. And when a sale is made to be paid in such a currency, the value of the thing sold and not the value of the Confederate money at the time the debt falls due, is the measure of the damages.—*Hill, Adm'r, v. Erwin et al.*, 44 Ala. 661; *Herbert & Gessler v. Easton*, 43 Ala. 547.

4. Evidence of the separate understanding of one of two parties to a contract is not permissible to vary the written agreement entered into by both. There can neither be a contract or the modification of a contract without the *aggregatio mentium*. "A contract which the parties intended to make, but did not make, can not be set up in the place of one which they did make, but did not intend to make.—*Sanford v. Howard*, 29 Ala. 684.

5. The witness, Russell Jones, did not afford the proper criterion for the ascertainment of the value of the property sold. To determine this value, reference is to be had to the price which the property bears in the market at the date of the sale, and not to some speculative conclusion as to the effect of some remote cause or such value.—*Ward v. Reynolds*, 32 Ala. 384, 391.

Wharton, Ex'r, v. Cunningham.

6. The evidence of a custom to sell for Confederate money was inadmissible. The custom was illegal. Besides, there was no proof of its antiquity.—*Barlow v. Lambert*, 28 Ala. 704; *Garey v. Meagher & Co.*, 37 Ala. 630; *Petty v. Gayle*, 25 Ala. 472; *Jewell v. Center*, 25 Ala. 498; *Ala. & Tenn. R. R. v. Kidd*, 29 Ala. 221; *Steel v. McTyre*, 31 Ala. 667.

WATTS & TROY, for appellees.—1. The bill of exceptions was not signed before the adjournment of the court, or within ten days thereafter, by agreement of counsel. It should therefore be stricken out.—Revised Code, § 2760; *Kitchon v. Moye*, 17 Ala. 394; *Haden v. Brown*, 22 Ala. 572; *Byford v. The State*, 36 Ala. 270; *Union Ind. Rubber Co. v. Mitchell*, 37 Ala. 314; *Maddox v. Broyles*, 42 Ala. 436; *Alford v. Eubanks*, 44 Ala. 277.

2. The act of February 14, 1870, is unconstitutional, because it does, in fact, amend section 2760 of the Revised Code. The amended section should therefore be set out in the act.—Const. Ala. Art. 4, § 2.

3. It is also unconstitutional, because it interferes with the rights of the appellees. Does not the act perform a judicial function, by taking from one party a right he had before the law was passed, and giving the other a right in conflict with it? This should make it bad.—*Sanders v. Cabaniss*, 43 Ala. 173; *Weaver v. Lapsley*, 43 Ala. 229; *Carleton & Slade v. Goodwin*, 41 Ala. 153; *Ala. Life Ins. Co. v. Boykin*, 38 Ala. 510.

PETERS, J.—This is an action of debt, founded on three several instruments in writing, called in the pleadings promissory notes or bonds. They are payable to the appellant, as the executor of William Wharton, deceased. One is for one thousand and sixty-nine dollars and sixty cents, made on the 24th day of November, 1863; another for five hundred and eighty-one dollars and sixty cents, made on the 17th day of March, 1862; and a third for eighteen thousand, one hundred and two dollars, made on the 11th day of March, 1864. Each of said debts are pay-

able twelve months after the respective notes or bonds, by which they are secured, become due. The action was commenced in October, 1856, in the circuit court of Cherokee county, and the venue changed from that county to the county of Baine, where a trial was had, and a judgment was rendered for the plaintiff below, who is the appellant in this court, for the sum of seven hundred and fifty-eight dollars and twenty six cents, damages, together with costs. From this judgment the plaintiff in the court below appealed to this court.

The record shows that there were five pleas in bar, interposed by the defendant below. They were, in substance, as follows: 1. Not guilty to all the counts in the complaint. 2. That the note first above mentioned "was given for the purchase and price of a certain mule, and other articles of personal property, purchased by defendant Cunningham, and that parties thereto *understood* or *agreed* that the same should be discharged by a payment in Confederate currency or treasury notes." 3. That the bond second above mentioned "was given for the price of a negro slave, sold by plaintiff to the defendant Cunningham, and that the parties thereto *understood* or *agreed* that the same should be discharged by a payment in Confederate currency or treasury notes." 4. That the note third above mentioned "was given for the price of certain lands, sold by the plaintiff to defendants, and that the parties thereto *understood* or *agreed* that the same should be discharged by a payment in Confederate currency or treasury notes." 5. Payment.

The bill of exceptions shows that the defendants in the court below offered evidence tending to prove that said notes were given for property purchased at a public sale, made by the plaintiff, as executor of the last will of William Wharton, deceased; that at the sale the executor refused to give notice to the bidders that "gold and silver will be required," in payment of the debts thus contracted, but gave notice that "the property will be sold on a credit of twelve months, with interest from date; note and approved security required. All sums under five dollars,

cash." This notice was written and published on the day of sale, before the sale commenced. It was also proven that the notes were given for the property described in the defendants' pleas. The specie value of the several items of property sold was also shown, and the difference between this value and the amount of the bids for the same. To this proof there was no objection. After this was done, the defendants' counsel asked his witness: "What kind of currency was there in circulation in the county?" This was objected to, but the court overruled the objection, and the witness answered that "the circulation was Confederate currency." This answer was also objected to, but the objection was overruled, and the plaintiff excepted. The defendants' counsel also asked the witness Cunningham, one of the defendants, "what was his understanding as to receiving Confederate currency by the plaintiff at the sale?" This was objected to by plaintiff, but overruled by the court, and the plaintiff excepted. The defendants then proved, against the plaintiff's objection, the value of Confederate currency at the date of the maturity of the note given for the land. And in the further progress of the trial before the jury, the court permitted the defendant to prove, against the plaintiff's objection, "that there was no express understanding between him (Cunningham) and the plaintiff that the plaintiff was to take said currency, that is, Confederate currency; but it was his own understanding." The plaintiff moved to exclude this separate understanding of the witness, but the court refused, and the plaintiff excepted. There was much other testimony of a similar character, which was improperly let in, but it is not necessary to discuss these errors, as the principles on which the judgment in this case will rest will enable the court, in a new trial, to avoid the irregularities thus committed.

If it had been shown that the sale in this case had been made by an order of the probate court, then all the evidence establishing a sale for Confederate currency would have been improper; for such a sale can only be made for funds which would be a legal tender in the payment of

Wharton, Ex'r, v. Cunningham.

debts.—*Hill, adm'r v. Erwin et al.*, 44 Ala. 661. But the sale in this case seems to have been made by an executor who may have derived his power to sell the property of the testator from the will, which may have conferred the authority to sell for Confederate currency or treasury notes. Such a sale, under such an authority, would be good. *Thorington v. Smith*, 8 Wall. 1. But the pleas here open the issue to let in the evidence of a payment in Confederate money, and also the proof of an *understanding or agreement* to that effect between the parties. But the proof must be kept within the limit of the pleas. It must show that both parties to the contracts sued on understood that these contracts should be discharged by a payment in Confederate currency or treasury notes. But if the understanding is between the creditor and the principal debtor, in a contest with a surety this would avail the surety as a defense. The evidence, then, that this understanding existed only on one side, is incompetent under such pleas. The court below, therefore, erred in letting in such evidence in favor of the defendants, against the plaintiff's objection. The proof must tend to support the pleas, or it is incompetent and irrelevant.—1 Phill. Ev. p. 732, (4th Amer. ed.) Hill & Cowan's notes.

The evidence which was introduced touching the currency in circulation in the county at the date the notes were made or became due, which was introduced against the objection of the plaintiff, was also irrelevant, and should not have been admitted. The court erred in overruling the objection to it.

For these errors, the cause must be remanded.

The pleas are, that it was the agreement of the parties that the notes sued on should be discharged by a payment in Confederate currency, or treasury notes. Such currency or treasury notes are not money, or a legal tender in payment of debts, but they are specific things. In estimating the amount of the recovery on such a contract, this court has heretofore laid it down as a proper rule, that "the true criterion is the value of the property sold in lawful money at the date of the sale."—*Herbert v. Gessler & Easton*,

43 Ala. 547; *Fath v. Bliss*, 43 Ala. 512. Certainly, if the contracts are not to be carried into effect as the parties made them, by allowing a payment in Confederate currency or treasury notes, then the value of the property at the date of the sale, is a much more equitable measure of the damages than the value of the Confederate currency or treasury notes at the time the debts became due. Because the property would thus always have some value proportioned to its real worth; whereas, if its value depended on the value of the Confederate currency when the debts fell due, the value thus measured might be reduced to nothing. And a sale might turn out to become a mere gift of the thing sold. This would be a monstrous rule to enforce in trust sales, however it might be considered in contracts between parties able to control the stipulations of their own agreements. Law is the science of what is good and just—*Jus est ars boni et æqui*. Then, the law could not sanction a gift where a sale was intended to be made. For, it might have happened that a sale made in 1865, the purchase-money of which might not fall due until in 1866, when Confederate money was worthless, might turn out to be a transfer of the vendor's property to the purchaser for a consideration wholly worthless, when this was not the intention of either one of the parties. Such results are not consonant with justice. This would be a wrong to the vendor. And the law does wrong to no one. *Lex nemini facit injuriam*. Then, the charge of the judge in the court below, that "the plaintiff was only entitled to recover the value of Confederate currency at the time the note became due," was incorrect and erroneous. This was not in accord with the principles and the decisions above referred to. It can not, therefore, be sanctioned.

Let the judgment of the court below be reversed, and the cause be remanded for a new trial.

[NOTE BY REPORTER.—The following opinion was delivered in response to an application for a re-hearing, and in

Adkinson et al. v. Wright, Adm'r.

response to the motion to strike the bill of exceptions from the record :]

PETERS, J.—The bill of exceptions found in the record in this case is sufficiently signed to give it validity. It is made good by the provisions of the “act relating to bills of exception,” approved February 14, 1870, (Acts 1869–70, p. 99.) Although it was signed on June 8, 1869, before the passage of this act, yet the act has a retro-active effect, and cures its deficiency in this respect. It is an act regulating a matter of practice, and it may operate in that way. The motion to strike it from the record is, therefore, overruled. And the application for re-hearing is denied, with costs, and the opinion originally delivered in this case is ordered to be re-filed and adhered to.

ADKINSON ET AL. *vs.* WRIGHT, ADM’R.

[ACTION ON PROMISSORY NOTE.]

1. *Perishable property; what not indispensable to authorize sale of.*—It is not indispensable that an application for the sale of property of an estate, because it is liable to waste or of a perishable nature, should be in writing and be verified by affidavit. But for the sake of order and precision, such an application should always be in writing and be verified by affidavit.
2. *Same; order of sale, when not void.*—Where the record shows that application was made, and that the court was satisfied by proof that the property was of the perishable nature alleged, and its sale would be beneficial to the estate, the sale is not void.

APPEAL from Circuit Court of Coffee.

Tried before Hon. J. MCCAULEY WILEY.

THE appellants were sued by the appellee, as administrator of Wiley Daniel, on a promissory note made by them payable to him in his representative capacity. They

defended on the ground that the note was given in payment for forty bushels of corn and a wagon, purchased at a sale had under an order of sale made by the probate court on the verbal application of the administrator.

The appellants had consumed the corn before suit was brought, but still retained possession of the wagon at the time of the trial, and did not offer to return it. The records of the probate court, including the order of sale, were introduced as evidence on the part of the appellee. The order of sale recites: "This day came Wm. Wright, the administrator of the estate of Wiley Daniel, deceased, and made a verbal application for an order of sale to sell," &c., [here follows description of property, the corn and wagon included,] upon the ground that said personal property is perishable and wasting, &c. And the court having heard the proof adduced in support of said application, and being fully satisfied that the application is fully sustained, and that the said property is perishable and liable to waste and that it will be beneficial to said estate that the same should be sold at as early a day as possible, &c. It is therefore ordered," &c. [Here follows order of sale.]

This being all the evidence, the court, at the request of the plaintiff, charged the jury, that if they believed the evidence they must find for the plaintiff. There was a verdict and judgment accordingly, and hence this appeal. The charge of the court is now assigned as error.

W. C. OATES, for appellants.—1. The note sued on was given for property sold at an administrator's sale, made by order of court. The proceedings in the probate court do not show that that court had jurisdiction. The record does not show that there was any written application verified by affidavit, as required by law. This was necessary to entitle the court to take jurisdiction; and without jurisdiction the sale was void.—Rev. Code § 2068; *Wilson, adm'r, v. Armstrong*, 42 Ala. 168.

W. D. ROBERTS, *contra*.

(No brief furnished the REPORTER.)

Lane and Wife v. Mickle.

B. F. SAFFOLD, J.—An application for the sale of any property of an estate, even that of a perishable character, ought, for the sake of order and precision, to be made in writing, and be verified by affidavit. But the statute—Rev. Code, § 2068—does not seem to require it expressly in the case of property liable to waste, or of a perishable nature.

The record of the proceedings in the probate court recites that the administrator made verbal application for an order to sell specified articles, on the ground that they were perishable and wasting; and that the court was satisfied by proof that the property was of the character alleged, and that the sale would be beneficial to the estate. It also recites that the petition was ordered to be recorded. This was a sufficient compliance with the law in this case.

The judgment was affirmed.

LANE AND WIFE *vs.* MICKLE.

[FINAL SETTLEMENT OF GUARDIANSHIP.]

1. *Guardian, with what to be charged on final settlement.*—A guardian who receives in payment of a solvent debt, due to his ward, the note of a third person instead of money, receives the same at his peril, and if he fails to collect said note, and the maker becomes insolvent, must, on his final settlement, be charged with the amount of the debt, and interest on the same, from the time it was due, although he may have used due diligence to collect said note.

APPEAL from the probate court of Randolph.

Heard before the HON. W. W. DOBSON.

This was a proceeding by appellants, John Lane and Martha, his wife, against appellee, as guardian of said Martha, to compel him to make final settlement of his

guardianship. On the 13th of May, 1861, a decree was rendered in the probate court of Randolph county, in favor of said Martha against the administrator of her father's estate, for \$212.49; and at the time of the rendition of the decree the said administrator and sureties were solvent. The appellee, as guardian of the appellant, Martha, received in payment of said decree in favor of his ward the note of said parties, solvent at the time, but who afterwards became insolvent, and the note was lost to the estate of the ward, though the guardian had used due diligence to collect it. In the final settlement of the guardianship accounts, the court allowed said insolvent note as a credit in favor of appellee as guardian, to which appellants excepted, and they now assign the same as error.

JAMES AIKEN, for appellants.—If the trustee, without the sanction of the *cestui que trust*, receives lands in satisfaction of the trusts, funds, or debts, equity will hold him responsible for whatever loss may ensue.—*Royalls, adm'r, v. McKinzie et al.*, 25 Ala. 364; see, also, *Lane and Wife v. Mickle*, 43 Ala. 109; *ib.*, June term, 1870.

All the evidence is set out, and the supreme court should reverse and render judgment.—Revised Code, § 2251.

C. D. HUDSON, *contra*.

PECK, C. J.—This case was in this court, on the appeal of the present appellants, and was decided at the January term, 1869. The decree of the probate court, on which that appeal was taken, was reversed, and the cause remanded for another trial. The law of the case was then settled, and the rights and the liabilities of the parties determined. The case is reported in the 43d Ala., p. 109.

By the decision then made, we held that the guardian of Mrs. Lane, the said appellee (Mickle), was liable to account for the sum of two hundred and eleven 49-100 dollars, the amount of a decree in the probate court of Randolph

Lane and Wife v. Mickle.

county, in her favor, against the administrator of her father's estate, Dr. J. H. Davis, which came to the hands of appellee, as guardian, &c., as aforesaid, and interest on the same, from the date of said decree. We also held that said appellee was not entitled to be credited on his account, as guardian, for the note on the two Emorys, which he had received in payment of said decree, and that said note should not be allowed as a credit on said guardian's account.

Another trial was had in said probate court, and, notwithstanding the decision of this court, the said appellee was permitted to introduce evidence, and was himself examined, to show he was entitled to be credited on his account, as guardian, for the said note of the Emorys, which we had decided should not be allowed; and said probate court, on said evidence, allowed said note as a credit on his (the guardian's) account, and discharged said guardian, and taxed said appellants with the costs.

The appellants excepted to the ruling of said court in allowing this note of said Emorys as a credit on the appellee's account as guardian, &c.

The evidence on which said credit was allowed is set out in a bill of exceptions, signed and sealed at appellants' instance, and they have again appealed to this court.

The evidence is irrelevant and without merit, and wholly insufficient to sustain the ruling and decree of said probate court. On said evidence, the note of said Emorys should have been rejected and disallowed, and a decree should have been rendered for appellants for the amount of said decree against said Davis, and interest on the same from the date of said decree, allowing the appellee ten 55-100 dollars as commissions, and ten dollars as an attorney's fee, which appellants do not object to; and that this may be done, said decree is reversed, and the cause is remanded, not for another trial, but with instructions to said probate court to proceed and render a decree in favor of said appellants, said John Lane and Martha Lane, his wife, for the use of the wife, for the amount of said decree, being two hundred and eleven 49-100 dollars, and interest

on the same from its date, after deducting said credits of ten 55-100 dollars as commissions, and said ten dollars as an attorney's fee; and said Mickle, said appellee, will pay the costs of this court and of said probate court.

MEDICAL COLLEGE OF ALABAMA vs. MULDON & SONS.

[ACTION TO RECOVER FROM INSURANCE COMPANIES THE AMOUNT REQUIRED TO BE PAID TO THE TRUSTEES OF THE MEDICAL COLLEGE AS A PRE-REQUISITE TO TRANSACTING BUSINESS IN THE CITY OF MOBILE.]

1. *Constitution of Alabama; Article IV, section 2 of, construed.*—Section 2, Article IV, of the constitution of Alabama, which requires the repeal of the sections of an act that are amended, imposes on the legislature the duty of formally repealing them; but when the general assembly fails to repeal the sections amended, they are repealed by virtue of the constitution.
2. *Section 1186 of Revised Code, payment required by to be made to Medical College; not a vested right, but in the nature of impost or tribute.*—The annual payment of \$200 to the medical college of Alabama, at Mobile, imposed by section 1186 of the Revised Code on all insurance companies not incorporated by this State, and doing business in the city or county of Mobile, was in the nature of an impost or tribute. The college acquired no vested right to it, because no consideration moved from the college.
3. *Same; force and effect of act repealing, on suits brought afterwards.* The college can not maintain an action commenced after the repeal of the law requiring such payment, to recover the amount due up to the time of the repeal. A statute, when repealed, must be considered except as to transactions which are passed and closed, as if it never existed.

APPEAL from City Court of Mobile.

Tried before Hon. C. F. MOULTON.

THE appellees were agents during the years 1867 and 1868, of seven life and fire insurance companies not incorporated by the State of Alabama, and as such transacted

their business in the city of Mobile during those years, without having paid to the trustees of the medical college at Mobile the sum of \$200 for each company during each of the years before transacting business, &c., as required by section 1186 of the Revised Code. This section of the Code was incorporated therein from an act passed 24th February, 1860, and is the only part of the act in any way relating to the medical college at Mobile.

The medical college was incorporated on the 30th of January, 1860, and no reference is made in the act of incorporation to the gift or impost required of insurance companies by section 1186 of the Revised Code.

On the 9th of August, 1868, section 1186 of the Revised Code was amended by striking out that part which required the payment, &c., to the trustees of the medical college. The amending act was attacked in the argument as unconstitutional, and the Reporter has thought it best to give it in full. The act is as follows :

“An act to amend § 1186 of the Revised Code of Alabama.

“SEC. 1. *Be it enacted by the general assembly of Alabama,* That section (1186) eleven hundred and eighty-six of the Revised Code of Alabama, be amended by striking out the words, “to the trustees of the medical college at Mobile the sum of two hundred dollars, such payment to be made from year to year so long as such agency is continued in the city or county of Mobile, which section reads as follows : “Such agent as before mentioned, before taking any risk or transacting any business of insurance in the city or county of Mobile, must pay to the treasurer of the fire department association of Mobile the sum of two hundred dollars for the benefit of such association ; to the trustees of the medical college at Mobile the sum of two hundred dollars, such payment to be made from year to year so long as such agency is continued in the city or county of Mobile ; and any such agent taking any risk, or transacting any business of insurance in any other corporate city or town in this State, where fire companies now are, or that may be hereafter organized, must pay to the corpo-

rate authorities of such city or town, for the benefit of such fire companies, two and a-half per cent. upon the gross amount of premiums received by such agent, such payment to be made from year to year, so long as such agency is continued in such city or town."

"Approved, August 5, 1868."

On the 14th day of November, 1868, the medical college brought this suit against the appellees, to recover the amounts alleged to be due under said section 1186 of the Revised Code, for transacting business during the years 1867 and 1868.

The cause was tried below on an agreed statement of facts, but as this statement had no material bearing upon the decision of the court, it is unnecessary to notice it further.

A trial by jury having been waived, the court gave judgment for the defendants, and hence this appeal.

J. LITTLE SMITH, for appellant.—(Appellant's brief did not come into Reporter's hands.)

HAMILTON, *contra*.—1. The right of recovery in this case is now gone by the repeal of the act.—7 Wallace R. 506, 514; Sedgwick on Statute, 51; *ib.* 541; 13 Howard, 429; 3 *ib.* 350; 15 N. Y. 152; 1 Hill, 324, 328; 4 M. & Payne, 341; 1 N. H. 61; 14 Ill. 334; 4 Ala. R. 487; 14 *ib.* 435; 5 Cranch, 281; 6 *ib.* 429.

2. Here is no contract or vested right.—3 Stewt. 387; 1 *ib.* 347; 1 Hill, 324; 15 N. Y. 152; 4 Metcalf R. 76; 18 Maine R. 109; *Sneider v. Heidelberger*, MS. opin. Jan. term, 1871.

3. This is not a tax proper, but rather the taking of one man's property for the benefit of another.—39 Penna. Reports, 73; 5 Maryland R. 227; 2 Seld. R. 358, 366; 4 Comstock, 419, 424; 4 Hill R. 140. This is a *peculiar imposition* placed upon these insurance companies *for doing business in the city and county of Mobile*, and is not required for the doing business in any other part of the State. It operates a discrimination *against, and to the prejudice of,*

the business of that city and county, and does not lie within the legislative power.

4. No defense of contract is available, for this gift originated in 1860, by an act of the legislature. The charter was enacted by a separate act, and contains no allusion to any such gift; and was passed six days after the other law. It is not a tax to the State, but a gift to a private corporation, and for its benefit alone. It is true, the burthen is on a foreign corporation, but the benefit is special, and not for the good of the whole State; it is, in fact, a privilege bestowed by the legislature, against the spirit and letter of the constitution of the State, and is a perversion of the power of the government.

5. The whole property obtained by this corporation is by its charter declared to be for its exclusive benefit, so that this tax or imposition is purely for this college. It is true, it is declared to be a department of the university, but the property is still for this private use, and no part of the university funds can be applied for its benefit. If this could be held otherwise, and the fund for public use, the power of repeal is rather strengthened, for the State can surely release an advantage secured by its own act to itself.

6. The repeal of this act is required by the constitution, (art. XI, § 13,) for all taxes on foreign insurance companies *are for the benefit of common schools*, and the act of 1868, (p. 303, Acts of 1868,) levies a tax of 2 per cent. on gross income for that purpose. This act is not for common schools, but a medical school.

7. As to the repealing act:

1. The act, as found in the Code, (originally Acts of 1859-60, p. 116,) is repealed by the act of December 31, 1868.—See § 136, p. 340, Acts of 1868. This repealed all acts in relation to taxation, of a general or special character. And that such was its effect, we have legislative construction by the re-enactment of section 1168 of the Revised Code, so far as the fire department association is concerned.—Acts of 1869-70, p. 288.

2. It was repealed so far as this plaintiff is concerned,

and only so far, by the act of 1868, p. 9. That declares that section 1186 is amended by striking out that portion of the section which creates this tax, reciting the words used for that purpose. In the absence of the present constitution, the effect and meaning of this instrument would not admit of doubt. Then, to comply with the constitution, the act proceeds to recite the sections as it stands in the Code. The constitution then declares that this being done, the section so amended—that is, the section as it originally stood—shall be repealed.

The constitution thereby declares what shall be the status of the original law or section. The amendment *ipso facto* repeals the law as it stood before the amendment.

The position assumed by appellant is that if the constitution so operates *propria vigore*, the whole of the original section is repealed. This is an unnatural and forced construction. The original act is repealed as it stood, and it stands as the original amendment applied to it declares, which in this case is in effect only the repeal of the tax here claimed.

The alternative is presented by the appellant, that if this is not so, it must be that the whole act of 1868 fails of operation, because the legislature has not declared the repeal, as he says it was bound to do by the constitution, which is mandatory, and if not complied with the act is unconstitutional.

This construction is denied. The constitution does not declare that the legislature shall do so and so, but acts directly on the act as passed by the legislature. If the act, as passed, conforms to the conditions required, it is valid; if it fail to meet those conditions, it is invalid. The act, itself, is the subject on which the constitution acts, viz.: it must be but on one subject; that subject must be expressed in the title; and if the object be to revise or amend a previous enactment, the enactment so affected shall be recited, and that declares the enactment so revised or amended shall be repealed, not shall be declared by the act to be repealed, but shall be repealed. Not that the legislature

shall formally enact the repeal to the former act, but that the section or sections amended shall be repealed. This is declared to be the operation of this act, which conforms to the conditions required by the constitution.

The subject on which the constitution operates is the legislation, *not* the legislature. The one legislation, that is, the present, must conform to the conditions; the other legislation, that is, the past, is then declared to be in the condition of a repealed act.

There is nothing in the language of the constitution, or the object to be secured, which requires any other construction, and of which the whole effect would be uselessly to add to the new law the four words, "said act (or section) is repealed," and this simply to conform to a theory.

B. F. SAFFOLD, J.—The medical college was incorporated on the 30th of January, 1860. On the 24th of February, 1860, a statute was enacted to regulate the agencies of insurance companies not incorporated by the State of Alabama, in their operations within the State. This law was comprehensive in its character, and designed to protect the citizens against irresponsible companies and agencies. It stipulated how suits should be instituted against them, the least amount of capital actually invested which should entitle them to carry on their business, what statements in writing should be filed in designated offices, and their effect as evidence. It provided for ascertaining and collecting taxes levied upon them. It also imposed restrictions upon them, and penalties for the violation or non-performance of all the requirements of the act. Amongst the requisitions exacted of them was one that, "before transacting any business in the city or county of Mobile, they should pay the treasurer of the Fire Department Association of Mobile the sum of two hundred dollars, for the benefit of said association; to the trustees of the medical college at Mobile the sum of two hundred dollars, such payment to be made from year to year so long as such agency is continued in the city or county of Mobile." A similar requisition was made of them in favor of fire com-

panies in any other city or town where they might do business. This law was embodied in the Revised Code of 1867, with inconsiderable exceptions, (§§ 1180, 1191,) and is still in force, except so far as it has been modified by subsequent legislation, to be considered presently.

This suit was commenced by the medical college on the 14th of November, 1868, to recover the sums alleged to be due to it under the provision above quoted, for the years 1867 and 1868. On an agreed state of facts the ruling of the city court was adverse to the plaintiffs, and from the said judgment the appeal was taken.

Section 1186 of the Revised Code, which is the 8th section of the act of 1860, was amended August 5th, 1868, by striking out the appropriation to the medical college. It is contended for the appellant, that this amendment is inoperative for non-compliance with article 4, § 2, of the State constitution respecting the repeal of the section amended. This constitutional provision was intended to make legislation express and comprehensible, and to avoid as far as possible the complications growing out of the implied repeal of laws. We have held it to be mandatory so far as to nullify parts of laws not expressed in the title, and the whole law, when the unity of the subject was violated and the matter was inseparable. It is plainly the duty of the legislature to formally repeal a section amended, but when it fails to do so, the courts should nevertheless maintain the legislation if there is vigor enough in the constitution to correct the omission. In this case the constitution directly commands the precise thing to be done, and is a law that the section amended is repealed. The proposition to amend a particular section of a law, is the expression of the subject to be legislated upon. This new act contains the entire section amended, and the amendment is clearly set forth.

What is the character of the plaintiff's claim? It is not a penalty, for that is a suffering in person or property imposed by law or agreement for something committed or omitted. It is not strictly a tax on account of the disposition made of it, and because other provision is made in

McSwean v. Faulks et al.

the statute for the taxation of these agencies. It must, however, be referred to that head, and is a *quasi* impost or tribute exacted by the State and appropriated to the benefit of this college. If it be admitted that there are some of the constituents of a contract between the State and the companies, which is the utmost that can be claimed for the plaintiff, no consideration moves from the plaintiff, and therefore it is a stranger to the consideration upon which the contract is founded. Without such a consideration no vested right is created. But the statute giving the donation was repealed before trial. When a statute is repealed, it must be considered, except as to those transactions which are passed and closed, as if it never existed.—Dwarris on Stat. 676; *Butler v. Palmer*, 1 Hill, 324–328; 9 Wall. 506. Rights of action and other executory rights arising under a statute are said to be vested, (*Beadleston v. Sprague*, 6 Johns. R. 101,) but unless they amount to a contract, and the statute being simply repealed, the very stock on which they were grafted is cut down, and there is no rule of construction under which they can be saved.—1 Hill, 328.

The judgment is affirmed.

McSWEAN vs. FAULKS ET AL.

[APPEAL FROM ORDER DECLARING NULL AND VOID AND SETTING ASIDE SALE OF DECEDENT'S LANDS.]

1. *Order of sale made by probate court in 1861; only prima facie good.*—An order for the sale of a decedent's lands, for distribution among his heirs, made by a probate court in this State, in the year 1861, is only *prima facie*, and not conclusive.—*Mosely v. Tuthill*, 45 Ala.
2. *Same, for what causes such sale may be set aside.*—A sale under such an order, made in the year 1863, may be vacated and set aside on motion, founded on the petition of the parties complaining, who are distributees of said estate, made in the court of probate wherein the record of the first order and sale are found, if it appear that such sale has never

been confirmed, and the purchaser at such sale has failed to give the security for the purchase-money required by law, and is dead at the date of said motion.

3. *Subsequent purchaser, what notice charged with.*—A subsequent purchaser who has bought such land from the vendee at such sale, can not claim to occupy the position of an innocent purchaser for valuable consideration without notice. He must be visited with notice of all the facts that his vendor's title would disclose.—42 Ala. 616.

APPEAL from Probate Court of Barbour.

Tried before HON. H. C. RUSSELL.

The facts upon which the case turns are sufficiently stated in the opinion.

PUGH & BAKER, for appellant.—The order of sale was not void as first granted.—*Satcher v. Satcher*; 41 Ala. p. 26.

Did that order lose its validity by the suspension of it? The order was never revoked. Allowing the suspension of the order, as set forth in the record, did not revoke the order, it is a question of authority to sell. The authority being once granted by a valid order, continues until that order is revoked. If that order was ever revoked, how, and when? While the order was *suspended* merely, by the direction of the court, the land was worked for the benefit of the distributees. When the suspension was terminated by the order of the court, and the administrators were directed to execute the first order of sale, the authority to sell was complete.

The first order was made because an equitable division could not be made without a sale. This ground for ordering the sale existing when the first order was granted continued to exist, and there was no necessity for a new petition setting forth a ground which had once been alleged in a petition and proved. If it could not be divided without a sale in 1861, how could such necessity for a sale cease in 1863 or 1864. The probate court acted on the ground once established to give it jurisdiction, and its order was never revoked but *suspended merely*, and there was no necessity for any additional action by the court to authorize a sale.

The order was not to sell for Confederate money. There is no such proof, and the sale was not made for Confederate money. The purchase-money, or a portion of it, may have been paid in Confederate currency, and the balance may still be unpaid. These facts furnish no ground for setting aside and declaring void the order of sale, and sale under it. If the purchasers were to pay now what they bid for the land, they would be entitled to a deed. How are the appellants prejudiced, when the legal title is in them, and can not be divested until the purchase-money is paid.

JERE N. WILLIAMS, *contra*.—1. The probate court may set aside or disregard any order or decree that is not final, whenever the interest of the estate and of the parties concerned requires it.—*Harrison et al. Ex parte*, 7 Ala. 736; *Middleton's adm'r v. Maul's adm'r*, 16 Ala. 479; *Walker v. Mock's adm'r*, 39 Ala. 568.

2. An order by the probate court for the sale of land is not final until the sale is made, reported, and confirmed; and if not final, it may be either set aside by the court or disregarded as if never made.—*Duval's Heirs v. P. and M. Banks et al.*, 10 Ala. 636.

3. In this case an order of sale is granted, but there the representatives of the estate stop. They then petition for and obtain an order to keep the estate together for an indefinite period, not longer than ten years, and under this order the estate is held. Surely this revokes or sets aside the order of sale. The two orders cannot be in legal operation at the same time. One or the other must necessarily be inoperative and void. The probate court has only statutory jurisdiction of proceedings to sell property of estates. No statute authorizes the suspension of one order and at the same time the operation of another directly contrary to the order suspended.

4. Where no specific rule of practice is prescribed for the probate court, the rules of practice in chancery, so far as they are applicable, should be followed.—*King v. Collins' adm'r*, 21 Ala. 363.

5. This sale, if for no other reason, is void because the administrator, not having an interest in the estate, was a purchaser.—*Callaway v. Gilmer*, 36 Ala. 354.

6. Even if the first order of sale is good, the second and that under which the land was sold is void, because the requirements of the statute were not complied with ; and the decree of the court in setting it aside is without error.—*Satcher's Heirs v. Satcher's Adm'r*, 41 Ala.

7. But if either or both the orders of sale are good, and the sale was had without compliance with the requirements of the statutes regulating and controlling the acts and doings of administrators under such orders, then the sale itself is void, and the decree of the court in setting it aside is free from error.

PETERS, J.—This is an order setting aside a sale made by the probate court during the rebellion.

The record shows that Lorenzo Faulks died in the county of Barbour, in this State, in the year 1861, without disposing of his property by will. His widow, Elizabeth L. Faulks, and Thomas C. Parker, administered upon his estate. And in October, 1861, the said representatives of said estate filed their petition in the probate court of said county of Barbour, praying an order for the sale of the real estate of said deceased for distribution among his heirs. This order was granted, and the lands of said deceased directed to be sold on a credit of twelve months. The application for this order of sale seems to contain all the allegations necessary to give the court jurisdiction of the subject matter, and of the parties, as required by the statute. Said order was granted on the 9th day of December, 1861 ; but no sale was made under it until February, 1862, when the sale was made, and reported to the court, but the court refused to confirm it, and the same was vacated.

After this, the said representatives of the estate of said deceased applied to said probate court for an order to keep said estate together for one year, or a period not longer than ten years. This order was also granted. After this,

in December, 1863, the said representatives applied to said court of probate to renew said order of sale of the real estate of said deceased. On this application it was ordered by said probate court that "T. C. Parker and M. L. Faulks, administrators of Lorenzo Faulks, deceased, be allowed now to proceed to make general sales of said estate as heretofore ordered, but which has been suspended for the purpose of making crops," &c. A sale was accordingly made on the 15th day of December, 1863, both of the real and the personal property of said deceased. This sale was duly reported on the 13th day of January, 1864. This sale was not confirmed, but rejected by said court of probate. And after this, it seems that another sale of said lands was made on the 16th day of February, 1864, which was also reported to the court. This last sale was never confirmed, and Parker, the purchaser, has since died.

On the 13th day of February, 1869, the appellees moved in said court of probate, on petition filed, to "declare said orders of sale as to said lands under the same to be null and void, and to vacate and set aside said orders and said sale." On the hearing, "the sale of said land by said administratrix and administrator was declared null and void." It was shown that the appellant, McSwean, had purchased a portion of said land from Parker, who had purchased the same at said sale while he was the co-administrator of said estate. From this order vacating and setting aside said sale McSwean appeals to this court, and here assigns for error—1st, the setting aside said sale; 2d, the granting the prayer of the petitioners as appears by the record.

The record leaves it uncertain whether the sale was made under the first order of the probate court, granted in 1861, or under the order *renewing* the said order, in 1863, but it appears that the credit upon which the lands was sold was not a credit of twelve months, as required in the first order of 1861, but only a credit from February 16th, 1864, to the 15th of December, 1864. And it does not appear that Parker ever paid for the land bid off by him, or that bonds with sufficient surety were given for the purchase-money.

Such an order as that first above said, made by a competent court after the adjournment, would be conclusive, but the court would still retain power over the sale. *Duval's Heirs v. P. and M. Bank et al.*, 10 Ala. 636, 653. But this order is not made by such a court, and the court of probate of Barbour county was not bound to confirm it. No action could be had by the lawful jurisdiction at the return of the last sale in 1864. This was a foreign proceeding, and has no conclusive effect.—*Martin v. Hewitt*, 44 Ala. 418. Not only the sale in such a case, but the order may be set aside upon a proper showing in the court of probate.—*Mosely v. Tuthill, McGuire et al.*, 45 Ala. 621. But even without this, the court of probate had authority to vacate the sale, and was bound to do so, when the proper security for the purchase-money has not been given as required by law.—Revised Code, §§ 2091–3, 2221, 2222, 2225, 2228. No one but McSwean complains, or objected to the setting aside the sale. He is a subsequent purchaser from Parker. He was bound to take notice of the title he was buying. He had an opportunity to know all the facts of his title, and if he proceeded regardless of this opportunity, he can not claim to occupy the position of an innocent purchaser without notice.—*Wilson v. Wall*, 34 Ala. 288, 305; *Center v. P. and M. Bank*, 22 Ala. 755; *McGehee v. Gindrat*, 20 Ala. 101; *Johnson v. Thweatt*, 18 Ala. 747; *Herbert v. Hanrick*, 16 Ala. 597; *Witter v. Dudley*, 42 Ala. 616. The evidence does not show that McSwean purchased for Confederate treasury notes, and if he did, as he paid the price, this could not affect his title.—Ordin. 1867, No. 38, Pamph. Acts 1868, p. 185. He took such title as Parker could convey. This title was inchoate, and subject to be defeated. He therefore has no reason to complain. The sale was properly set aside, and the court was clothed with full jurisdiction of the parties and the subject matter.—Rev. Code, §§ 2093, 2092, 2095; Pamph. Acts 1868, p. 187; Ordin. No. 40, § 1.

The judgment of the court below is affirmed.

GUICE *vs.* PARKER.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN, &C.]

1. *Commission to take answer of non-resident defendant ; when invalid.*—A commission to take the answer of a non-resident defendant to a bill in chancery, issued by the register in blank, as to the name of the commissioner, is invalid ; and the request of the register to the person receiving it to insert his name as commissioner does not legalize the act.
2. *Bill for discovery ; what allegation necessary to sustain.*—In order to sustain jurisdiction for relief sought, consequent upon a discovery, the bill or cross-bill must allege that the facts are material ; that their discovery by the defendant is indispensable, and that the plaintiff is unable to prove such facts by other testimony. The failure to allege these facts subjects such a bill to demurrer.

APPEAL from Chancery Court of Barbour.

Heard before Hon. B. B. McCRAW.

This was a bill exhibited by the appellee against the appellant, and sought to subject to the vendor's lien certain lands described in the bill for the unpaid purchase-money due thereon, which was evidenced by a promissory note, executed by defendant.

The answer substantially admits the allegations upon which the equity of the bill rested, but defendant sought by it, as a cross-bill, to reduce the amount of recovery to a sum less than that expressed on the face of the note, alleging, in substance, that at the time the note was given the land was estimated at a specified number of gold dollars ; that at that time greenbacks were much depreciated, and that in making the note the value of the gold dollars was expressed in the sum, which this kind of money would be worth at the time the note fell due, estimating the depreciation of greenbacks at the maturity to be the same as when the note was made ; that it was also agreed between the parties that should the value of greenbacks appreciate when the note fell due, that appellant should re-

ceive a corresponding credit on the note. In this bill it also alleged that appellee, who was a non-resident, had written a letter to an agent, which recited the true statement of the contract and agreement, which had been seen by appellant. The bill prays that appellant be made a party defendant thereto, and be required to answer the several allegations thereof; that upon the final hearing the court would reform the promissory note so as to express the true meaning of the contract; and tenders appellant \$475 in "greenbacks" or \$425 in gold, as the amount due on said note, according to the contract, which sum was paid into court, &c.

The cause was heard on bill, answer and cross-bill, proof and motion to strike answer to cross-bill from the file, and the chancellor decreed that the note mentioned constituted a lien on the land for its full amount, &c. The other facts of the case necessary to an understanding of the points decided, are fully set out in the opinion; it is unnecessary to set out the evidence in relation to the contract, as set out by defendant in the cross-bill; the testimony very clearly disproves this allegation of the cross-bill.

SEALS, WOOD & ROQUEMORE, for appellant.

JOHN A. FOSTER, *contra*.—The decree refusing the motion to strike appellee's answer to the cross-bill from the file, is interlocutory, and this court will not reverse for error in such a decree. But there was really no error in this. The commission to take the answer to the cross-bill was properly issued by the register. Such a proceeding does not require an order of the court before it can be resorted to, nor does it require notice to the adverse party. The commission is issued upon the mere application to the register by the party desiring it. This is all the rule of practice demands.—Rev. Code, § 3486; *ib.* p. 827; Rule Chancery Pr. No. 31; *ib.* § 3364.

2. There is no need of a reference to the register to take an account when there is no denial of a sum due on a

promissory note, and the account consists in a mere calculation of the interest. The reference is discretionary; not of absolute right. If the sum ascertained by the chancellor is correct, this is enough.—Revised Code, § 3385, 3386, 3387, 3393.

B. F. SAFFOLD, J.—The bill was filed by the appellee to subject land to the payment of the purchase-money, under the vendor's lien.

The chief error assigned is that the court refused to strike from the file the complainant's answer to the defendant's cross-bill. It appears that as the complainant was a non-resident, the register, under the 31st rule in chancery, issued a commission to take his answer, but not knowing the first name of the commissioner selected, he sent it to him in blank, with direction to insert his name. The commissioner did so, and took the answer, which was forwarded to the register, and filed by him.

In *Worsham v. Goar*, (4th Port. 441,) it was held that a commission to take a deposition must be perfect when it leaves the hands of the clerk. If sent forth in blank, it issues to no person, and the consent of the clerk for the one receiving it to fill all blanks will not legalize the act. The result of the failure of the register to issue a proper commission is that the answer is not sworn to.

This answer contains a demurrer to the cross-bill, for want of equity. The merit of the cross-bill was in the discovery it sought. To maintain the jurisdiction for relief, as consequent upon the discovery, it is necessary to allege in the bill that the facts are material, and that the discovery of them by the defendant is indispensable as proof; that the plaintiff is unable to prove such facts by other proof. This allegation was not made in the cross-bill. It was, therefore, subject to the demurrer.

Without recapitulating the testimony, it is sufficient to decide that the proof abundantly shows that the defendant cannot maintain his version of the contract. There was no necessity for a reference to the register.

The decree is affirmed.

TAUNTON & BROOKS *vs.* McINNISH.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN.]

1. *Original* and amended bill; form but one bill.*—In chancery, the bill and amended bill make but one suit. And when the original bill waives the answer on oath, and the amended bill requires that the answer to it shall be on oath, and the only answer filed is the answer to the amended bill, and the cause is heard on the bill and answer, the answer is only to be taken as true so far as it is responsive to the amended bill.
2. *Same.*—In such a case, if the answer admits the material allegations of the original bill and sets up new matter in defense to the original bill, by way of cross-bill, which is denied by the answer to the cross-bill, and the cross-bill is demurred to and is without equity, the chancellor may decree the relief asked by original bill without testimony to support it, so far as it is admitted.
3. *Cross-bill without equity; allegations of, effect of.*—An answer to an amended bill may be turned into a cross-bill, but if the cross-bill thus made is without equity, the allegations of the cross-bill will not be permitted to serve the purposes of an answer and cross-bill, so as to overturn the allegations of the original bill by the new matter contained in it, which is inconsistent with the allegations of the original bill and the amended bill so far as they are repeated in the amended bill.
4. *Cross-bill; without equity when allegations of could be made fully available as matters of defense by proper answer.*—A cross-bill is an auxiliary suit dependent on the original bill. And if the matters of such cross-bill are set up in the answer in the nature of a cross-bill, and it turns out that such matters are merely a defense available under the answer, or are sought by way of discovery, and that no decree need be made on the cross-bill for the defendant's relief, which could not be made on the original bill without cross-bill, such cross-bill will be dismissed for want of equity.
5. *Register, report of; objection to, when can not be raised for first time in this court.*—If the report of the register is permitted to be confirmed in the court below, without objection or exception, it can not be attacked in this court for the first time, when it is regular on its face.
6. *Promissory note for dollars; when will be treated as an obligation to pay lawful dollars of the United States.*—A promissory note given to secure the purchase-money for land, in these words, "Due Nevin McInnish, or bearer, four hundred and eighty dollars, for value received, with interest from date. This Jan. 28, 1865. (Signed,) M. V. B. Taunton," which is sought to be defended in an answer in chancery in the nature of a cross-bill, because the same was alleged to have been made under an agreement to be discharged by a payment in Confederate treasury

Taunton & Brooks v. McInnish.

notes, will be treated as an obligation to pay the sum mentioned therein in lawful money, if the allegations of the cross-bill in reference to the medium of payment of such note are denied by the answer to such cross-bill, and the same are not supported by proof.

APPEAL from Chancery Court of Elmore.

Tried before Hon. W. B. Woods.

The facts in this case are fully set out in the opinion of the court.

FITZPATRICK & WILLIAMSON, for appellants.—1. The answer being on oath must prevail, where it denies the allegations of the bill. The agreement to pay the note in Confederate money is responsive to the bill, and it is a denial of the liability to pay in legal tender money.—Story Eq. Pl. § 849a; Dan. Ch. Pr. (edition 1865,) p. 840 and notes; *Camp v. Simon*, 34 Ala. 126; *Byford v. Tucker*, January term, 1870.

2. The record shows that there was no order of reference, yet the decree is based on the register's report, and the defendant had no notice of the time and place of taking the account. This was altogether too irregular.—Revised Code, § 3386; Rule 89, Chan. Pr.; Revised Code, p. 835; *Weathers v. Spear*, 27 Ala. 455.

(No counsel appeared for the appellee, and no brief is furnished the Reporter.)

PETERS, J.—This is a bill in equity to enforce the vendor's lien for the purchase-money for a tract of land. It was filed in the first instance by Nevin McInnish and Duncan H. McInnish as complainants, against the appellants, Taunton & Brooks, as defendants. The original bill required the answer of the defendants without oath. The defendants did not answer, but demurred for a misjoinder of complainants. The demurrer was sustained, and the bill was amended by striking out the name of Nevin McInnish and accommodating the phraseology of the allegations to a sole complainant, said Duncan H. McIn-

nish. The amended bill required the defendant's answer on oath, and it contained the identical allegations of the original bill, except the alterations abovesaid. The defendants only answered the amended bill and took no notice of the original bill. The answer admits all the material allegations of the original and amended bills as the same are stated in these pleadings, but explains and alleges by way of further answer, that the consideration for which the land was sold was a *bay mare*, which was delivered at the time of the sale, and promissory note for \$480, which was to be paid in Confederate treasury notes or their equivalent in value, when the note fell due. The note is a due bill and bears date January 28, 1865, which was the date of the sale of the lands, mentioned in the original bill, by Nevin McInnish to Taunton. This answer is made under oath and prayed to be taken and "considered in the nature of a cross-bill, and heard at the same time as the amended bill." And the complainant is required to answer the same "not under oath." The complainant, Duncan H. McInnish, answered the cross-bill thus filed against him, and denied allegations of the cross-bill, upon which its equity was supposed to rest, and demurred to the cross-bill for want of equity. This demurrer is not noticed in the chancellor's decree. The prayer of the cross-bill is that the "chancellor grant to respondents such relief and render such decree as the equity and justice of the case may require." There was no testimony taken in the cause on either side, and the cause was heard for "final decree on the bill and answer." But before the final hearing there was a report of the master taken "in pursuance of a decretal order of the court" made in the cause, by which it appeared "that there was due the complainant on account of the unpaid purchase-money on the land in the bill mentioned, the sum of five hundred and forty-seven 46-100 dollars." This report was confirmed without exceptions. The decree of the court is that said land mentioned in the bill, which are mentioned also in the decree, "stand charged with the payment of said sum, and that a lien upon said lands for the payment of the said sum is

hereby declared." The register is then directed to sell said land without delay for the payment of said sum in cash, and to make title to the purchasers, and out of the proceeds to pay the costs and discharge the sum due the complainant, and the overplus, if any, to bring into court at the next term. "And it was further ordered that all the rights of the parties in this cause in respect to said lands, or any portion thereof, shall be forever divested by this decree and sale ordered to be made, and that the purchaser be let into the possession of the lands purchased by him or them." There is no notice taken in the decree of the answer as a cross-bill. From this decree, the defendants in the court below appeal to this court. And here the appellants assign as error the confirmation of the master's report, the order to the register to make title to the purchaser on the sale of said lands by him under said decree, and the decree of the chancellor.

The original and amended bill form but one pleading and but one suit. After the amendment is allowed, they stand and are to be treated as a whole, particularly when their statements are the same as to the material allegations in the cause.—*Winter v. Quarles, adm'r*, 43 Ala. 692; Story Eq. Pl. § 885; 1 Dan'l Ch. Pr. 455, Perkins Ed. A cross-bill may be made in an answer to an original or amended bill.—Rev. Code, § 3367, 3368, 3369. And an answer so made must be governed by the rules which govern a cross-bill. It must be served on the complainant and answered by him or taken, upon failure of answer, as confessed. And, if answered, the answer has the same force as an answer to a cross-bill. If the answer denies the allegations of the cross-bill, the denials must be overturned by proof as in an original suit. The cross-bill is to be treated as an auxiliary suit depending upon the original suit.—3 Dan. Ch. Pr. 1742, Perk. Ed.; Story Eq. P. § 399; *Nelson & Hatch v. Dunn et al.*, 15 Ala. 501, 513. A bill of this kind is usually brought to obtain a necessary discovery of facts in aid of the defense to the original bill, or to obtain full relief to all parties, touching the matters of the original bill, and to afford the chancellor opportunity to decree in favor

of a defendant, where his equities entitle him to something more than a dismissal from the court without relief, beyond the payment of his costs.—Story Eq. Pl. § 389, 390, 391. So if it appears that the relief sought in such a bill could be had on an answer to the original bill, properly framed, or by examination of the parties as witnesses in the cause, then a cross-bill for these purposes should not be entertained. Such a cross-bill is vicious for want of equity. Here the case made by the cross-bill was, that the note for the purchase-money of the land, subject to the vendor's lien, was to be discharged by a payment in Confederate treasury notes, and was consequently subject to be scaled. This was *pro tanto* a defense to the note, and could have been interposed by a properly framed answer.—*Alston v. Alston*, 34 Ala. 15, 16, 29; Rev. Code, § 3349. And a bill for discovery in such a case is unnecessary, because the parties on both sides may testify for themselves or be examined as witnesses.—Rev. Code, § 2732, 2704. Then the cross-bill in this case was vicious, and should have been overturned by the demurrer. This leaves the case to stand upon the bill and answer. The answer, stripped of the matter of the cross-bill, does not contradict the bill. And, although it is to be taken as true, so far as it may be considered as an answer to the amended bill, it does not, in this aspect of its allegations, deny the allegations of that bill. But this is only where it has been required to be made under oath.—Rev. Code, § 3452. Here the answer to the original bill was not required to be made under oath, and the amendment only reduced the complainants to Duncan H. McInnish, and set up the title to the note for the purchase-money in him alone, and notice of his equity to Brooks, the purchaser from Taunton. These facts are not denied in the answer. The answer in such a case could not overturn the allegations of the original bill. Then the chancellor's decree was not erroneous, because the allegations of the original bill are not denied by a sworn answer, made on the demand of the complainant. Such an answer must be supported by proof to give it the force required to overturn the bill.

Smith v. Flagg et al.

The error founded upon the confirmation of the master's report, is not well taken. The objection should have been made in the court below. It can not be raised here for the first time.—21 Ala. 433. Beside, there was no need for a reference to the master to state an account in this case. The ascertainment of the sum due was a mere matter of a calculation of interest. This the chancellor could do without a reference.

Let the judgment of the court below be affirmed, and the appellants will pay the costs of this appeal in this court and in the court below.

SMITH vs. FLAGG ET. AL.

[ACTION OF DAMAGES FOR BREACH OF WARRANTY OF SOUNDNESS OF A HORSE.]

1. *Warranty of soundness of horse; what evidence inadmissible to prove breach of.*—What a plaintiff said to his partner and co-plaintiff about defendant's warranting a horse to be sound, in the absence of defendant, and after the sale, is not evidence to prove a warranty of soundness in an action for a breach of such warranty.

APPEAL from City Court of Eufaula.

Tried before Hon. E. M. KEILS.

This was an action brought by appellees against appellant to recover damages for the breach of a warranty of soundness of a horse sold by appellant to appellees. On the trial, as appears from the bill of exceptions, one of the plaintiffs, Flagg, having testified that the defendant warranted the soundness of the horse, and that the horse was unsound at the time of the sale, and the defendant having testified directly to the contrary, one Corbin, co-plaintiff and owner of the horse with Flagg, was introduced as a witness, and testified that he was not present at the time

of the sale, but that when the horse was brought to him by his partner after the sale, he, Flagg, then informed him that defendant, at the time of the sale, warranted the horse to be sound. The defendant was not present when this was told to witness. The proof was not objected to at the time it was offered, but before the jury retired the defendant moved the court to exclude this testimony of the witness Corbin from the consideration of the jury, as it was illegal evidence, which motion the court refused and the defendant excepted. The court charged the jury, if they found from the evidence that such declarations were made by one of the plaintiffs to his copartner, as testified to by Corbin, they might consider it along with the other evidence in the case to establish a warranty of soundness to the horse. To this charge defendant excepted. There was a verdict and judgment for plaintiff, and hence this appeal. The refusal to exclude Corbin's testimony and the charge given, are now assigned as error.

J. L. PUGH for appellant.

(No brief for appellant came to Reporter's hands.)

GARDNER & LEE, and S. F. RICE, *contra*.—If the evidence was competent for any purpose, the court did not err in refusing the motion. If not competent evidence to prove the warranty, it was competent testimony tending to corroborate and strengthen the testimony of the first witness, who had been flatly contradicted.

B. F. SAFFOLD, J.—In a suit for damages for the breach of a warranty of a horse, the testimony of a witness, who was one of the plaintiffs, that his co-plaintiff and partner told him on his return home with the horse which he had purchased, that the defendant had warranted him to be sound, the defendant not being present, is inadmissible, because it is mere hearsay relating to a past transaction. *Martin vs. Hardesty*, 27 Ala. 458.

The judgment is reversed and the cause remanded.

Jones, Adm'r, v. Trustees Florence Wesleyan University.

JONES, ADM'R, *vs.* TRUSTEES FLORENCE WESLEYAN UNIVERSITY.

[ACTION ON SUBSCRIPTION TO ENDOWMENT FUND OF UNIVERSITY, &C.]

1. *Subscription, terms of ; acceptance of by corporation ; how may be proved.*
The acceptance by the trustees of an incorporated university of the terms of a subscription to its endowment fund may be proved by parol testimony.
2. *Corporations, entries in ; when inadmissible as against third persons.*—Entries in the books of a private corporation relative to any property or right claimed by it, are inadmissible as evidence to establish such rights against third persons.
3. *Subscription ; what sufficient evidence of acceptance of.*—Liability or expense incurred by an educational incorporation on the faith of subscriptions made to its endowment fund, is evidence of its acceptance of the subscription with the terms imposed.

APPEAL from the Circuit Court of Lauderdale.
Tried before Hon. JAMES S. CLARK.

The appellees as plaintiffs claimed of defendant damages for the breach of an agreement made by the defendant's intestate, in 1859, to pay \$1000 in stock of the Memphis and Charleston Railroad Company on the 1st January, 1860, as an endowment of the university. The matters of defense were set up, by consent, under the plea of *non assumpsit*.

The plaintiff gave in evidence, after proving its execution, a paper signed by defendant's intestate and quite a number of other persons, which bound each subscriber to transfer the amount placed opposite his name, in the stock of the Memphis & Charleston Railroad Company, to the university for its endowment by the 1st of January, 1860.

It contained two conditions upon which the subscription was made. 1st. Each subscriber of \$500 was to receive a perpetual and transferable scholarship. 2d. If the university should cease to exist, or be removed, the stock was to revert to the original grantor, his heirs or assigns.

Jones, Adm'r, v. Trustees Florence Wesleyan University.

George W. Karsner was allowed to testify on behalf of the plaintiff that he was the treasurer of the corporation, (this fact was also shown by the books of the corporation), and as such, the custodian of the subscription list, and it was his understanding that the plaintiffs agreed to accept the terms and conditions of the subscription, but he could not tell when or where they did so. He further testified that he was instructed by the plaintiffs to procure the transfer of the stock subscribed, and succeeded to a considerable extent. An objection to this testimony, on the ground that the facts stated could only be shown by the records of the corporation, was overruled.

The witness, Karsner, further testified that the trustees of the university had received said subscription list from their agent, W. H. Brown, who solicited and obtained it, and retaining it ever since had collected many of the subscriptions. It was further proved, that upon the faith of these subscriptions they had employed professors and incurred other expenses; that they had always been willing and ready to give defendant's intestate, in his life time, a scholarship on payment of his subscription, and were still willing now to give a scholarship to defendant on the transfer of the railroad stock, &c.; that at the time of the subscription the university was in full operation, and so continued until forced to suspend during the late war by the occupation of the country by hostile armies; that a school of high grade was, however, kept up by one or two professors; that in 1869 all the professorships were filled, and that at the time of the trial the university was in full operation, and students were being received and educated under the scholarships transferred to subscribers who had complied with the terms of their subscriptions. Karsner testified that defendant's intestate never, in his life time, withdrew said subscription or expressed a desire to do so, so far as he knew. There was evidence tending to show a demand on defendant, requiring compliance with the terms of the subscription, &c., and a refusal, &c., and an offer on the part of the plaintiffs to comply on their part.

The books of the corporation were then introduced as

Jones, Adm'r, v. Trustees Florence Wesleyan University.

evidence, both parties reading from them such extracts as tended to support their respective claims. It seems from these records that the trustees at different times prescribed different terms of the endowment they were seeking, but it was not shown that they obtained any subscriptions on other conditions than those mentioned in the agreement, or subscription list, the foundation of this action. There was nothing else in these books in any way differing from the parol evidence herein above set out. The court also allowed the plaintiffs, against the objection and exceptions of defendants, to introduce evidence tending to show they did not always preserve a record of their meetings and proceedings.

This was, in substance, all the evidence having any bearing on the case, and the court below charged the jury, in substance, as stated in the opinion, that a proposition made by one party and accepted by the other within a reasonable time and before it was withdrawn, was binding on both; that liability or expense incurred by the plaintiffs on the faith of the subscription, was sufficient evidence of assent to its terms, and an acceptance of it. To this charge defendant excepted.

Among other charges asked by defendant and given the court, the defendant asked the following, which were refused:

"1st. That said alleged contract of his intestate was without consideration."

"2. That there is no mutuality in said supposed contract."

"4. That if the jury believe from the evidence that the said supposed contract of his intestate was not accepted by the board of trustees of the Florence Wesleyan University, at a meeting of said board, at which seven members were present, or by some agent appointed at a meeting of said board, at which seven members were present, then the plaintiff can not recover in this action."

"5. That if the jury believe from the evidence that the said supposed contract was materially variant from the propo-

Jones, Adm'r, v. Trustees Florence Wesleyan University.

sition authorized by the board of trustees, neither party was bound by said contract."

"6. That if the jury believe that the scholarships proposed by the board were materially variant from those proposed on his intestate's supposed contract of subscription, then he was not bound to accept the same."

"11. That if the jury believe from the evidence that defendant's intestate, after signing said supposed contract, either died or changed his intention as to complying with the terms of said agreement before he had notice of an acceptance of the terms of said subscription by the plaintiff, then they must find for the defendant."

To the refusal to give these charges, the defendant duly excepted. There was a verdict and judgment for the plaintiff, and defendant appeals, and here assigns among other errors—

1. Allowing Karsner to prove, by parol, the acceptance of the subscription by defendant, and his understanding that the plaintiff agreed to accept the same.

2. The charge given.

3. The charges refused.

JOSIAH PATTERSON, for appellant.

E. A. O'NEAL, *contra*.

(No briefs came into Reporter's hands.)

B. F. SAFFOLD, J.—Persons acting publicly as officers of a corporation are presumed to be rightfully in office. Not only the appointment, but the authority of the agent of the corporation, may be implied by the adoption or recognition of his acts by the corporation or its directors. *State Bank v. Comegys*, 12 Ala. 772 ; Ang. & Ames on Corp. § 284. Although, as a general rule, corporation books are evidence of the acts and proceedings of the corporate body, when they are properly kept, entries in them of matters relative to any property or right claimed by the corporation can never be evidence, unless made so by an act of the legislature, to establish such rights against third

Jones, Adm'r, v. Trustees Florence Wesleyan University.

parties.—*Phil. R. R. Co. v. Hickman*, 28 Penn. St. R. 318; Ang. & Ames on Corp. § 679. Wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents, are express promises of the corporation; and all the duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie.—*Bank of Columbia v. Patterson's Adm'r*, 7 Cranch, 306. From these authorities and from the necessity of the case, as well as the tendency of our legislation to assimilate corporations acting within their chartered powers to persons, the objections to Karsner's testimony, and other parol testimony of the plaintiffs, was properly overruled.

The charges of the court, to which exception was taken, asserted, in substance, that a proposition made by one party and accepted by the other, within a reasonable time, and before it was withdrawn, was binding on both; and that liability or expense incurred by the plaintiff on the faith of the subscription was sufficient evidence of assent to its terms, and an acceptance of it. In the absence of any testimony to the contrary, there was certainly no error in this. The first and second charges asked by the defendant were properly refused. The fourth was, also, objectionable, because the jury might find that the contract was made between the parties on other evidence than that specified. The fifth and sixth were incorrect, because either party was at liberty to accept a proposition made by the other. The eleventh was properly refused, because there was no evidence that the defendant's intestate ever desired to withdraw his subscription.

The judgment is affirmed.

TURRENTINE, ADM'R, vs. PERKINS ET AL.

[BILL IN EQUITY TO TRANSFER SETTLEMENT OF ESTATE FROM PROBATE TO
CHANCERY COURT, AND FOR DIRECTIONS, &C.]

1. *Purchaser at judicial sale; when liable for interest on arrears of interest.*—Where, in execution of an ante-nuptial agreement that the wife should have one-third of all the real and personal property her husband should die seized and possessed of, during her life or widowhood, in lieu of her dower and distributive share, the chancery court, with the consent of the widow, decreed a sale of the lands of the deceased husband, free from any claim of the widow, and prescribed as a part of the terms of sale that one-third of the price should be payable on the termination of her life or widowhood, but the interest thereon should be annually paid to her,—*Held*, that the purchaser was liable to her for interest on the arrears of interest.
2. *When receipt of Confederate money by trustee, to whom note at such sale is made payable, will not amount to payment.*—In such a case, though the note for the purchase-money was taken payable to the register, he was not authorized to bind the beneficiary without her consent, or to acquit the debtor, by receiving Confederate currency in payment of any part of the interest.

APPEAL from the Chancery Court of Limestone.
Heard before Hon. WM. SKINNER.

The facts are fully stated in the opinion.

HOUSTON & PRIOR, for appellant.
DAVID P. LEWIS, *contra*.

(No briefs furnished the Reporter.)

B. F. SAFFOLD, J.—The bill was filed by the appellant to transfer the settlement of the estate he represented to the chancery court, and to procure necessary instructions for the proper performance of his duties. Among other matters involved, was the liability of the estate to the administrator of Mrs. Webb, and the register in chancery, as her trustee.

There was an ante-nuptial agreement between Mrs. Webb and her husband, John Webb, that in lieu of her dower interest and distributive share of his estate, she would take a third interest in all of his real and personal property he should die seized and possessed of, during her life or widowhood. In pursuance and execution of this agreement, she and the administrator of her husband, and his heirs and distributees, agreed that the said property should be sold, and one-third of the proceeds of the sale should be assigned to her use as aforesaid. They applied to the chancery court for assistance, and obtained a decree under which all of the lands of the estate were sold free and discharged from all claim and right of the widow. The purchase-money was to be paid in three annual installments, the first two of which were to be paid at maturity for the benefit of the estate. The last, though to be due nominally at a specified time, was in fact to be payable on the termination of the life or widowhood of Mrs. Webb, but the interest upon it was to be paid annually to the register for her use. The note itself was made payable to him. A. S. Perkins, the appellant's intestate, was the purchaser of all the lands, and gave his notes therefor, with security, in pursuance of the decree of sale.

In 1862, a few days before the federal forces occupied Lauderdale county and North Alabama, he made payment of about one year's interest, in Confederate currency. The register received this currency, but Mrs. Webb refused to do so, and it was not used for her benefit. No further payments of interest have been made. On the hearing of the cause, the chancellor refused to allow the estate of Perkins a credit for the Confederate currency, and also charged it with interest on the annual interest due on the said last note, which had not been paid at maturity. The appeal is taken from the decree in these two respects.

It is contended for the appellant, that his intestate was only responsible as purchasers at judicial sales usually are, and according to the tenor of the note which he was required to give. This note is for \$10,468.26, payable Janu-

ary 1st, 1861, with interest from January 1st, 1858, payable annually.

Generally, the interest falling due annually upon a debt does not bear interest, but in estimating what the creditor is entitled to receive, the accumulated interest, without rests, is simply added to the principal. It will be remembered that the interest of Mrs. Webb in this note was in lieu of her dower in the lands for which it was in part given. She had no property in the principal sum, but only in the interest accruing during her life or widowhood.

Where land to which the right of dower has attached, has been aliened by the husband, and an assignment of dower by metes and bounds would be unjust, the widow is dowable of the value of the land at the time of the alienation, the interest on one third part thereof to be paid to her annually during her life.—Revised Code, § 1641. In *Ware v. Owens*, (42 Ala. 212,) this court, construing the section referred to, held the widow entitled to interest on the annual interest from the time it was payable. We approve of the construction as entirely consonant with equity and justice.

The same rule was applied in a similar case in *Beavers & Jemison v. Smith*, (11 Ala. 32,) the court holding the principle to be the same as in cases of annuities for maintenance, where interest on the arrears is allowed.—*Newman v. Auling*, 3 Atk. 579.

An annuity is a yearly sum stipulated to be paid to another in fee, or for life, or years, and chargeable only on the person of the grantor.—Co. Litt. 144b. The purchase of an annuity is not usurious, and may be specifically enforced.—3 Pars. Cont. 111, *n. g.*, 139, 368, 369, 374. The contract of the decedent, Perkins, was of this nature. As he was bound to know the authority under which the sale was made, so must he be held to a knowledge of the terms. The stipulations of the decree of sale were a part of the contract, and to these he assented. There was no error on this point.

The register was only a *quasi* trustee, and had no au-

Clement v. Nelson, Adm'r,

thority to bind Mrs. Webb or acquit Perkins by his receipt of the Confederate currency—*Aicardi v. Robbins*, 41 Ala. 541.

The decree is affirmed.

CLEMENT vs. NELSON, ADM'R.

[APPEAL FROM DECREE OF PROBATE COURT REJECTING CLAIM AGAINST
INSOLVENT ESTATE.]

1. *Insolvent estate, claim against ; how must be filed.*—A claim against an estate which has been declared insolvent must be filed in the office of the judge of probate *after* the estate is so declared insolvent, within the time and in the manner required by the statute, or the same will be barred forever.—Rev. Code, § 2196, 2200, 2201.
2. *Same ; what filing not sufficient to prevent claim being barred.*—A filing *before* the declaration of insolvency under § 2241 of the Revised Code is not sufficient to save the claim from the bar on a proceeding of insolvency, but only from the bar of non-presentation, or non-claim. Rev. Code, § 2241.

APPEAL from Probate Court of Dallas.

Tried before HON. JOHN F. CONOLEY.

This was an appeal from the decree of the probate court rejecting certain claims against the insolvent estate of N. J. Ogletree, on a partial settlement and distribution thereof.

On the 12th day of December, 1868, appellant filed her claim, which was properly verified, (which had been previously presented to the administrator), in the office of the judge of probate. It was duly marked, filed, and endorsed by the probate judge, and entered upon the docket of claims against estates, &c. This claim was the only one filed in the probate court against said estate, up to the time it was declared insolvent, on the 8th day of March,

Clement v. Nelson, Adm'r.

1869. The claim was not filed again after the declaration of insolvency, or in any way brought to the attention of the court, or any one connected with the estate, but remained in the office of the probate judge as it had been filed, until the day set for the hearing, &c., which was more than nine months from the time the estate was declared insolvent, when it was brought to the attention of the court by the objections filed by the administrator. When the administrator went to the probate office, more than nine months after the declaration of insolvency, and before the time appointed for the partial settlement, to file objections to such claims as he thought proper, he found appellant's claim in a package together with ten claims which had been properly filed, after the declaration of insolvency. He then separated this claim from the others, filed objections to it, and returned it to a "pigeon-hole" in a package with the other claims, and it so remained until the day set for the hearing.

This being all the evidence, the court, on motion of the administrator, rejected the claim, on the ground that it had not been filed in the office of the probate judge within nine months after the declaration of insolvency, and appellant duly excepted.

PETRUS & DAWSON, for appellant.—We have not seen any case in which this identical point which here arises has been decided. The appellee insists that though the claim was on file and regularly docketed from the day the estate was declared insolvent to the day of settlement, it was not *placed on the file* after the declaration of insolvency. In construing a statute, the court does not confine its consideration to the mere letter, but looks also to the "reason of the rule," and the intent of the law-maker. In the act requiring claims to be filed within nine months after decree of insolvency, the intention was to give all parties interested an early opportunity of examining and contesting all claims. Here the claim was *on file* and *on the docket of claims* against that estate during all the time allowed for filing claims. No one could have examined the file or docket

Clement v. Nelson, Adm'r.

without noticing this claim. Can the law require the useless formality of taking this claim off the file, and again putting it back on the file? Or of taking it off the docket where it was regularly docketed, and putting it on again?

But it is said that this claim was not called to the attention of the judge *after* the estate was declared insolvent. The claim was in his custody, "*filed*" by him, and it was *by the judge* placed on the docket of claims against this estate, with the name of the claimant, the date, amount, and nature of the claim, and it so continued in the custody of the judge and on the docket during *all* of the nine months.

The spirit and meaning of the law seems to be, that persons having claims against insolvent estates shall be allowed all the time from the grant of letters until nine months after the declaration of insolvency, to file their claims, but no more.

If the court will consider the meaning of the word "*within*," as used in this statute, it is obviously intended to operate merely as a statute of limitation, and limits the time *beyond* which claims shall not be filed. The appellee would limit the meaning of the word "*within*" to its most literal and limited sense. Mr. Webster's first definition of this word is: "In the inner part"; his second definition is: "In the limit or compass of, *not beyond*, used of place and time"; his fifth definition is: "Not later than." The first or primitive meaning would not make any sense in this statute. But "*not beyond*," "*not later than*," clearly defines the intent of the law-makers, which was to fix a time after which claims could not be filed. By one statute of limitations, an action must be brought *within* six years *after* a note falls due. This does not mean that it may not be brought before the note is due, for in many cases, as in attachments, suit may be commenced before the note is due.

JOHNSTON & NELSON, *contra*.—What is it to "*file*" a claim, within the meaning of § 2196 of the Revised Code?

"*Filum*, file; a thread, string or wire upon which writs

Clement v. Nelson, Adm'r,

and other exhibits in courts and offices are fastened or 'filed' for more safe keeping and ready reference."—Burns' Law Dictionary ; Bouvier's Law Dictionary ; Jacobs' Law Dictionary ; *Phillips et al. v. Beene*, 38 Ala. 251.

"The origin of the term 'filed' indicates very clearly that the filing of a paper can only be effected by bringing it to the notice of the officer who anciently put it upon the "string" or "wire." Accordingly, we find that 'filing' a paper is now understood to consist in placing it in the proper official custody on the part of the party charged with the duty of filing the paper, and the making the appropriate endorsement by the officer."—*Phillips, Goldsby & Blevins v. Beene*, 38 Ala. 251.

"A paper is said to be 'filed' when it is delivered to the proper officer, and by him *received* to be kept on 'file.'"—Bouvier's Law Dictionary.

When must a claim be "filed" against an insolvent estate?

The statute says: "*Within nine months after the declaration or after the claim accrues.*"

If a filing *before* the declaration is good, so would a filing be good that was made *before* the claim accrues. The word *after*, in both places where it occurs in said section, means *after*, and there is no room for construction.

Before the court can allow this claim, it will have to add to the section by construction, and make it read thus: "Every person having any claim against the estate declared insolvent must file the same in the office of the probate judge within nine months after such declaration, or after the same accrues, *unless such claim has been filed in the office of the probate judge before such declaration.*"

Can the court insert in the section the words that are *italicised*?

It is said the claim was in the judge's office continuously from Dec. 12, 1868, and was therefore filed after the declaration.

But this cannot be so, if the definition of filing, above given, is correct.

This claim was placed in the official custody of the judge

Clement v. Nelson, Adm'r.

but *once*, and that was *before* the declaration of insolvency ; and that for the purpose of *presentation* under § 2241 of the Code ; or, if not for that purpose, for no purpose ; whereas, the statute requires that it shall be placed in the official custody of the judge "*after such declaration*," so that the judge, the administrator, and the creditors may know that it is insisted on as a claim against the *insolvent estate*.

Special attention is invited to the case of *Phillips, Goldsby & Blevins v. Beene*, 38 Ala. 248.

In that case the affidavit to a claim was placed in the office of the probate judge within the proper time, yet the court held that the affidavit was not filed, because it was not called to the attention of the judge or his clerk until after the nine months had expired.

The court remarked, "the authorities show conclusively, that a paper not brought to the notice of the proper officer, and placed in his custody, can not be said to be filed.

It is said that our own court has decided that an affidavit made before the declaration of insolvency is good as a verification of a claim. That is true ; but the decision will not support the argument drawn from it, that a filing before the declaration is good. On the contrary, that decision is fatal to the argument.

In *Norville v. Williams*, 35 Ala. 551, the affidavit was made after the death of the intestate, but before the declaration of insolvency. The court held the affidavit good, and in stating the reasons that led to that conclusion, this one was given :

"1. The statute is silent when the verification shall take place. Its language is, 'verified by the oath of the claimant or some other person who knows the correctness of the claim, and that the same is due.'

"That decision is right. The time of verifying the claim is not limited in the statute. But the statute does limit in express terms, the filing of the claim. It says, 'the claim must be filed within nine months after such declaration.'"

The silence of the statute, as to when the verification

shall take place, makes more explicit and more emphatic, the time when the "filing" shall take place

PETERS, J.—This case involves a construction of section 2196 of the Revised Code. That section is in these words: "Every person having any claim against the estate declared insolvent, must file the same in the office of the judge of probate, within nine months after such declaration, or after the same accrues, verified by the oath of the claimant, or some other person, who knows the correctness of the claim and that the same is due, or it is barred forever; but when a claim is filed by an executor or administrator, guardian or other trustee, it may be verified by affidavit of such executor, administrator, guardian or trustee; that he believes the claim to be just, due and unpaid; and in all cases where a claim is verified under this section within the time prescribed, if the verification is defective or insufficient, the defect or insufficiency may be supplied by amendment or proof, at any time before final decree." Rev. Code, § 2196. It is also directed that "the judge of probate must, when required, give a receipt for such claim to the claimant, his agent, or attorney, and must endorse on the claim the day when the same was filed and sign his name thereto. And "such judge must keep a docket of all the claims thus filed, which must be at all times during office hours, subject to the inspection of the administrator and creditors of the estate."—Revised Code, §§ 2200, 2201. These sections of the Revised Code constitute a peculiar system for the settlement and distribution of insolvent estates. What they require must be done or the claim will be barred. That is, it can not be enforced against the estate. Here the claim in controversy was not filed or docketed under this chapter of the Code governing the "proceeding as to insolvent estates." But it was filed and docketed under section 2241 of the Revised Code. This latter section is in these words; "The presentation may be made either to the executor or administrator, or by filing the claim or a statement thereof in the office of the judge of probate, in which letters were granted;

Clement v. Nelson, Adm'r.

in which case the same must be docketed with a note of the time of such presentation ; and if required, a statement must be given by such judge, showing the time of presentation."—Revised Code, § 2241.

The claim under discussion was filed by Mrs. Clement, with a proper verification, in the office of the judge of probate on the 12th day of December, 1868. And the estate was declared insolvent on the 8th day of March, 1869. The claim could not then have been filed against an estate declared insolvent ; because this was not the condition of this estate at that date. And as there are two statutes, the one allowing the claim to be filed before the insolvency in lieu of presentation to the administrator or executor, in order to save the demand from the bar of the statute of non-claim for failure to present the claim to the administrator or executor, and the other requiring a like filing after the declaration of insolvency in order to save the demand from the bar of non-claim on the proceedings in the insolvency, I feel constrained to hold that the two are different, and that the one was not intended to take the place of the other in either case. It follows from this construction that, the filing in this instance was not sufficient to save the claim from the bar of the statute of non-claim in case of a declaration of insolvency. In this latter instance, the claim must be filed after the declaration of insolvency, as required by the statute, or it will be barred for ever.

The judgment of the court below is in conformity with this construction, and is therefore affirmed at appellant's costs.

WESTERN UNION TELEGRAPH COMPANY *vs.*
PLEASANTS.[ACTION OF TORT TO RECOVER DAMAGES FOR KILLING HORSE BY NEGLIGENT
DRIVING, &c.]

1. *Foreign corporation; when may be sued by summons and complaint.*—A foreign corporation doing business in this State through a managing agent or employee, may be sued by summons and complaint, served on such agent or employee, upon a cause of action which accrued in the State.
2. *Same. authority of agent to hire horse; how may be proved.*—To recover damages against a corporation for the loss of a horse, caused by the carelessness of its agent who hired it, express authority to the agent to hire the horse need not be proved; it may be implied, where the evidence will warrant it.

APPEAL from City Court of Montgomery.
Tried before Hon. JOHN D. CUNNINGHAM.

THIS was an action of tort, by appellee against appellant, commenced by ordinary summons and complaint, and served upon the managing agent of defendant, to recover damages for the negligent and careless driving by defendant of a horse hired of plaintiff, whereby the horse was killed, &c.

The complaint was as follows :

<p>" Stephen D. Pleasants, plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p>Western Union Telegraph Com- pany, defendant.</p>	}	<p>The plaintiff claims of the defendant, a cor- poration, five hundred dollars as damages, for this, that the defendant hired of the plaintiff, for a reason- able reward, a certain horse of the value of five hundred dollars, to be used by one of its employees in and about its service and business, and after the defendant had so hired said horse and received him from the plaintiff for the purpose aforesaid, and during the term of such hiring, the said employee of said defendant using said horse in and about the business and service of the defendant, and while</p>
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so using the same, did so improperly and carelessly drive and use said horse, that by means thereof said horse was killed and wholly lost to the plaintiff."

The (appellant) defendant in the court below, by one Seville, who was thereto duly authorized, pleaded in abatement to the jurisdiction of the court, that "it is a corporation foreign to the State of Alabama, and was at the time of the commencement of the suit, and from thence hitherto until the present time, hath been, and is, a foreign corporation, duly incorporated under an act of the legislature of the State of New York, and organized and doing business under said act of the legislature in said State of New York, with its offices and officers in the city of New York, in said State, and was never chartered by, or organized under, any law of the State of Alabama," &c.

The plaintiff demurred to this plea, and the court sustained the demurrer.

Thereupon the defendant demurred to the complaint, and assigned as grounds of demurrer—1st, that the complaint does not sufficiently describe the corporate character of defendant, nor show that it is a corporation under any law of this State, having power to make a contract of hiring such as stated in the complaint; 2d, that no time is stated in the complaint when the alleged hiring took place, or whether the injury complained of accrued before the commencement of this suit, and if it so accrued, whether it did not accrue more than six years next before the commencement of this suit.

This demurrer was overruled by the court, and thereupon issue was joined upon defendant's plea of not guilty, &c.

The plaintiff introduced several witnesses, among others an operator and a clerk in defendant's office at Montgomery, who testified that at the time of the hiring, June, 1867, Seville was managing agent of defendant, and acted as such, to their knowledge, although they had never seen his appointment or authority to act as such; that he still continued to be manager, and they had never heard of his acts being gainsaid or disapproved by the company.

Seville himself testified that he was, at the time of the hiring, the managing agent of defendant; that a part of the line being down between Montgomery and Selma, he determined to go down and inspect the same, and for this purpose hired the horse and buggy of plaintiff, and, taking an employee of the company, left Montgomery at eight o'clock in the morning, drove slowly and cautiously some, twenty-six miles, and then started back, and had gotten about half a mile on their return, when the horse was suddenly taken sick, just about dark, and died, after the utmost efforts "to doctor him, by persons acquainted with sick horses."

There was evidence on behalf of plaintiff tending to show the value of said horse, and his soundness when he started out, and also to show negligence on the part of Seville and the person with him in driving the horse, and in not seeing that he was properly fed at the place where they stopped for dinner, &c.

After the court had given several charges at the request of plaintiff, which need not be further noticed, the court, at the request of the defendant, charged the jury that "it is not sufficient to show that Seville acted as the agent of the defendant in the hiring of the horse. The plaintiff must satisfy the minds of the jury that Seville was authorized to act as he did act, by the company, in the matter of said hiring." The court then charged the jury, at the request of the plaintiff, that "an express authority to Seville was not necessary, provided they find, from all the evidence in the case, that there was such authority." To the giving of this charge the defendant excepted.

There was a verdict and judgment against the defendant, who appeals, and here assigns as error—

1. Overruling the plea to the jurisdiction of the court.
2. Overruling the demurrer to the complaint.
3. The charge given at the request of defendant.

CHILTON & THORINGTON, for appellant.—1. The plea is good in form, being a substantial copy from Chitty.—See Chitt. Pl. vol. 3, p. 894, margin, and p. 897 as to affidavit.

Our Code distinguishes clearly between domestic and foreign corporations. The one is designated by the term "corporations," or "domestic corporations," the other as "foreign corporations."—Code, §§ 458–60, 456, relating to taxes; *ib.* §§ 2936–38, as to attachments.

The Code (§ 2568) provides that "when a summons is issued against a corporation, the summons may be executed by the delivery of a copy of the summons and complaint to the president, or other head thereof, secretary, cashier, or managing agent thereof."

This provision has reference to domestic corporations, and confers no authority to sue a foreign corporation. The subsequent section tends to strengthen this conclusion, showing how service may be perfected by affidavit, where the officers are unknown, or reside out of the State; then, process may be served on any white person in the employ of, or doing business for, said corporation. No such affidavit was made in this case.

There is no law requiring domestic corporations to have their officers residing in this State. Many of them now have presidents out of the State. The Selma, Rome and Dalton Railroad, and other roads in the State, have their chief officers resident without the State. And this is the category contemplated by the statute. If it had meant foreign corporations as well as domestic, it would have said so, as in section 2936, which says, "corporations, either foreign or domestic," may sue out attachments. And when the legislature would embrace "foreign corporations," it is done by name, as in section 2938 of the Code, prescribing how attachments may issue against "foreign corporations." And this is the remedy which this statute gives against foreign corporations, none other.

Foreign corporations can not be sued out of the State where they are chartered, unless the statute authorizes it. No such suit could be maintained at common law.—

1 Tidd's Prac. 116; *Middlebrooks v. Springfield Ins. Co.*, 14 Conn. 301; *Angell & Ames Corp.* § 403, and notes, and § 637, and notes; *McQueen v. Middleton Manufacturing Co.*,

16 Johns. 5; *Nash v. Evang. Lutheran Church*, 1 Miles, (Penn.) 78; *Dawson v. Campbell*, 2 ib. 171.

In the case of *Louisville Railroad Co. v. Letson*, (2 How. 558,) the true doctrine is laid down, which case was afterwards affirmed in *Marshall v. Baltimore Railroad Co.*, (16 How. 314; 20 How. 227, and 1 Black, 286,) making a corporation a citizen of the State which creates it. Such being the case, it follows that an attachment only can be maintained under our statute; and the court can obtain jurisdiction in no other way.

WALKER & MURPHEY, *contra*.

B. F. SAFFOLD, J.—The material issue in this case arises on the defendant's plea to the jurisdiction of the court. Can a foreign private corporation be sued in this State otherwise than by attachment? One of the characteristics of a corporation is its capacity to sue and be sued. For these purposes it is a citizen of the State which created it, and where its business is done.—*Louisville Railroad Company v. Letson*, 2 How. 497. Section 2568 of the Revised Code provides that when the suit is against a corporation, the summons may be executed by the delivery of a copy of the summons and complaint to the president or other head thereof, secretary, cashier or managing agent thereof. It is essential to the validity of a judgment that the court rendering it should have jurisdiction of the subject matter and the parties. It was a common law rule that every action should be tried in the county where the subject of it accrued. This was particularly the case in local actions, though in transitory actions where the subject might have arisen in any county, or abroad, the plaintiff might lay the venue in any county he might prefer, subject to the right of the defendant in proper cases to move for a change.—3 Chit. Gen. Pract. 647.

In this case, the court certainly had jurisdiction of the subject matter. If the summons was properly executed in the State upon one authorized by law to be served, then jurisdiction of the person of the defendant was obtained.

Stewart & Hudson v. Cole & Son.

The appellant insists that section 2568 refers alone to domestic corporations. It does not so state, and construing it with section 2569, such would not be a natural inference, because it is more probable to suppose that a foreign corporation would do business in the State through an employee or agent, than that a domestic one would have its principal officers residing out of the State. The demurrer was properly sustained.

The demurrer to the complaint presents no valid objection to it. The grounds stated are either insufficient, or such as should have been made available by plea in bar, or through the proof.

There is no error in the charge given, at the request of the plaintiff, that express authority from the defendant to its agent, Saville, to hire the horse was not necessary, provided they believed from all the evidence that such authority was given.—Story on Agency, § 56.

The judgment is affirmed.

STEWART & HUDSON *vs.* COLE & SON.

[ACTION ON ATTACHMENT BOND.]

1. *Attachment; what state of facts will not authorize issuance of.*—A shipment of cotton from this State by the usual route, for the honest purposes of trade, by a citizen of this State, who has the means in this State sufficient to pay all debts, will not justify the issuance of an attachment against his estate, on the ground that he "is about to remove his property out of the State, so that the plaintiff will probably lose his debt, or have to sue for it in another State."—Rev. Code, § 2928, cl. 5.
2. *Same; action against bondsmen; what necessary to defense of.*—A party sued upon the attachment bond, in such a case, for the wrongful or vexatious suing out of the attachment, must be prepared to show in his defense that one of the causes for attachment required by the Code, existed at the issuance of the attachment.—Rev. Code, §§ 2930–31.
3. *Abstract charge, refusal of; not ground for reversal.*—A judgment will

Stewart & Hudson v. Cole & Son.

not be reversed for an abstract charge, though its refusal would have been error, had it not been abstract.

APPEAL from the Circuit Court of Morgan.

Tried before Hon. JAMES S. CLARK.

The appellees, Cole & Son, who were merchants in Blount county, Alabama, became indebted in the spring of 1869, to Ewin, Pendleton & Co., in various sums. On the 14th day of February, 1870, Ewin, Pendleton & Co., on the ground that Cole & Son "were about to remove their property out of the State of Alabama, so that the plaintiff in attachment would probably lose their debt, or have to sue for it in another State," sued out an attachment, &c., which was levied upon sixteen bales of cotton belonging to the appellees, which were *in transitu* to Memphis, Tennessee, to find sale and a market there; and thereupon the appellees brought this action against two of the obligors upon the attachment bond, to recover damages for the breach thereof.

The defendants pleaded "not guilty," and a special plea that states in substance that the attachment was issued according to law and for grounds authorized by law, and for probable cause and not vexatiously, and without malice, and that defendants are merely sureties on said bond, and two other pleas not necessary to be further noticed.

It is not stated upon what pleas issue was joined, but the judgment entry recites that "issue being joined," &c.

On the trial it was proved, against objection of defendants, that it was the usual course of trade for persons living in Blount county to ship cotton via Decatur, Ala., to Memphis, Tenn., for sale, as was done in the case of the cotton levied on; and the plaintiffs, against the objection of the defendants, were permitted to testify that at the time the attachment was sued out and levied, the plaintiffs had more than sufficient property in the State of Alabama, (exclusive of the cotton levied on, and all exemptions allowed by law,) to pay off all their debts, including the one due Ewin, Pendleton & Co. But of what this property consisted, or where it was, was not stated. The court overruled the defend-

ants' objection to the admission of this testimony and permitted it to go to the jury, and defendants duly excepted.

The defendants offered testimony going to show that Cole & Son had repeatedly promised the attaching creditors to pay the amounts due, and had invariably broken these promises; that they had changed their trade from Nashville, where they became indebted to the attaching creditors, and afterwards entirely ceased to make purchases there, and very shortly after this commenced trading in Memphis, Tenn. There was no evidence whatever tending to show malice on the part of the defendants, or the attaching creditors. This was, substantially, all the evidence necessary to a proper understanding of the points decided.

The court, at the request of the plaintiffs, charged the jury that, "if they believed, from the evidence, that when the attachment was sued out Cole & Son had sufficient property (other than the cotton) of greater value, and more than sufficient to pay all their debts (after deducting the exemptions allowed by law,) then the shipment of the cotton without the State did not authorize the issuance of the attachment." To this charge defendants excepted.

The defendants also excepted to the refusal of the court to charge the jury, at their request, "that they can not find that there was malice in suing out the attachment, unless they believe there was malice against the persons of the plaintiffs."

There was a verdict and judgment for the plaintiffs, and the defendants appeal and here assign as error—

- 1st. The charge given.
- 2d. The refusal to give the charges asked.
- 3d. The admission of the testimony on the part of plaintiffs, to which the defendants objected.

D. P. LEWIS, and SAM'L MORROW, for appellant.—1. The charge given below, on motion of plaintiff, tended to mislead the jury and was unfavorable to a verdict on all the evidence. The effect of the charge was to exclude from the consideration of the jury every thing else, except the question, whether defendants in the attachments owned

other property than that about to be sent out of the State, exempt from legal sale, sufficient to pay their debts. They were, by the charge, led away from the enquiry, whether the attaching creditors would "probably lose their debt, or have to sue for the same in another State."

Again: the proposition of law can not be admitted that a defendant may send out of the State what amount of his property he pleases, free from liability to attachment, provided he can prove on trial that he has sufficient left to pay his debts, that is, liable to execution. Is a creditor to be required, under all circumstances, to have a correct inventory of the property of his debtor? And shall his liability to suit for attachment depend on the accuracy of the inventory which he may have?

The principle stated in Drake on Att. § 69, is under the law of Louisiana, which does not authorize an attachment for the cause specified in our Rev. Code, § 2927, (5). See Drake, appendix for Louisiana statute.

The case in Drake, § 70, Illinois, is not altogether unlike our own, and that in § 71, in Tennessee, is dissimilar.

The charge should not have omitted to direct the attention of the jury to the probability of the creditor losing his debt, or having to sue for the same in another State. The charge ignored all the evidence tending to show fraud.

The charge invaded the province of the jury, and not only dwarfed, but absolutely ignored the probability of losing the debt, as well as all other grounds of attachment.

Creditors cannot be supposed to know what property is owned by debtors with accuracy. Debtors may own property in distant parts of the State. In commercial life, punctuality is much more looked to than means in the possession of the debtor.

WALKER & BRICKELL, *contra*.—The object of the statute is, to protect the creditor against a loss of his debt, or the inconvenience of a suit in another State, for its collection. If the debt is not imperiled by the removal of the property, or the danger of a suit in another forum for its recovery is

not incurred, the statute does not authorize the issuance of an attachment. When the debtor has property other than that which is about being removed, subject to execution, accessible and sufficient for the payment of his debt, there can be no reason for suing out an attachment; no reason for not confining the creditor to the ordinary legal remedies.—Drake on Attachment, §§ 62-71; *Jones v. Lawrence*, 36 Ala. 618.

2. The evidence that the shipment of the cotton from Decatur to Memphis was the usual course of trade for persons residing in Blount county, where appellees resided, was properly admitted. Taken in connection with the evidence that appellees had property, other than the cotton, subject to execution, of sufficient value to pay all their debts, it repelled any unfavorable inference which might or could be drawn from the fact that they were sending it out of the State. It tended to repel the existence of probable cause, or a reasonable belief in the minds of the attaching creditors of the existence of a probable cause, for the issuance of the attachment. It showed that in the shipment of the cotton there was nothing unusual or suspicious. As all parties are supposed to contract in reference to the customs and usages of trade prevailing where they reside, or the contract is to be performed, this evidence would create the just presumption that the creditors could not, when their debts were contracted, have believed or expected that cotton of which their debtors might become the owner would remain in their possession in Alabama, but would be shipped beyond the State, and thus tend to show that the shipment of the cotton was by them made a mere pretext for a wrongful act.—Drake on Attachment, §§ 69-71.

3. The charge given by the court asserted a correct legal proposition.—Drake on Attachment, §§ 69-71; *Jones v. Lawrence*, 36 Ala. 618.

4. The charge first asked by the appellants was properly refused. It could have served no other purpose than to mislead the jury. If it had been given, the jury would probably have supposed that the plaintiff in attachment must have borne some hatred to the persons of the defend-

ants; must have intended to do them some physical injury through the instrumentality of the attachment.

PETERS, J.—This is an action for damages founded on an attachment bond. The appellees in this court were the plaintiffs in the court below. The cause was tried by a jury. There was a verdict for the plaintiffs for one hundred dollars, and judgment was rendered for this sum and costs. From this judgment the appellants, who were the defendants in the court below, bring the case here by appeal.

A creditor who seeks to proceed in the collection of his debt by the use of the harsh process of attachment, undertakes to show that some one of the causes which would authorize the issuance of an attachment "exists."—Revised Code, §§ 2928, 2930. If he fails to do this, the attachment is wrongfully sued out, and if the property of the defendant is seized under authority of process thus issued, it is in effect a trespass and an illegal invasion of the defendant's rights of property; for which the party causing the attachment to be sued out is responsible to the amount of the damages inflicted.—*Kirksey v. Jones*, 7 Ala. 622, 626; Rev. Code, § 2931. In case there is no malice, when the suit is on the attachment bond, as is the case here, the recovery must be confined to the actual damages; but if there is malice on the part of the attaching creditor against the debtor, then the jury may go beyond the actual damages and give smart money, by way of punishment for the malicious as well as the wrongful use of the process. *Floyd v. Hamilton*, 33 Ala. 237, 235. The ground relied upon to justify the attachment in this case was the fifth of those enumerated in the Revised Code, which is this: "When the defendant is about to remove his property out of the State, so that the plaintiff will probably lose his debt or have to sue for it in another State."—Rev. Code, § 2928, cl. 5. There was evidence tending to show that the defendants in the attachment suit, who are the plaintiffs in the suit on the bond, had sufficient means in this State to pay all their debts; that they were merchants, doing

business in the county of Blount in this State, and that Decatur was their shipping point on the railroad. It was also shown that the cotton attached was intended to be sent out of this State, to the city of Memphis, in the State of Tennessee, where the owners traded, for the purpose of finding a market there, and this was the usual course of trade from said county of Blount. Upon this evidence, among other things, the court charged the jury on the plaintiff's motion, that, "the shipment of the cotton without the State did not authorize the issuance of an attachment." There was no error in this charge. If the purpose of the shipment of the cotton was for the honest ends of trade, its shipment from the State for this purpose could not be prevented by attachment. The removal can only be prevented in this way when the plaintiff will probably lose his debt thereby, or have to sue for it in another State. All these circumstances are required to exist before the issuance of an attachment will be justified.—Rev. Code, § 2928, cl. 5, § 2930.

The charge asked by the defendants in the court below, in reference to malice, was abstract. There was no pretense in the proof that malice was relied on to increase the damages. The charge, had there been evidence to support it, would have been a proper charge. The malice in such a case which may be given in evidence to increase the damages, should be malice against the defendant in the attachment suit. But no evidence of this sort is shown in the record.

I am unable to perceive that the other objections raised on the assignment of errors are well founded.

The judgment of the court below is, therefore, affirmed.

PRESTRIDGE, ADM'X, *vs.* PATRICK IRWIN & CO.

[APPEAL FOR ORDER OF PROBATE COURT ALLOWING CLAIM AGAINST INSOLVENT ESTATE.]

1. *Letter written "per" another ; what purports to be ; what evidence renders admissible.*—A letter, containing an acknowledgment of the receipt of money, subscribed with the name of a party, "per" another, purports to be his writing, executed by his agent ; and may be received as evidence to charge him, when the person so signing it testifies that he was the clerk of the other in a different department of his business, had written some letters for him, at his request and dictation, and none without it, though he does not remember anything in connection with the particular letter, except that it is in his handwriting.
2. *Transactions by deceased ; what competent evidence of.*—The letters of an intestate, written to parties claiming indebtedness against his estate, and his drafts drawn on and accepted by them, and in their possession, is competent evidence of transactions between the parties to which they refer, tending to establish the correctness of the claims.
3. *Claim, verification of, by one who does not know correctness ; effect of.* The verification of a claim against an insolvent estate by one who really does not know it to be correct, if complete in form, is defective or insufficient only, and may be completed by proof at any time before the final decree.
4. *Merchants, accounts between ; when closed and draw interest.*—An account between merchants is closed at the date of the last item, and the balance will draw interest from that time.

APPEAL from Probate Court of Dallas.

Tried before Hon. JOHN F. CONOLEY.

This is an appeal from a decree of the probate court, allowing certain claims against the insolvent estate of J. E. Prestridge, deceased.

From the bill of exceptions it appears that appellees had filed and presented two claims against said estate, one for \$110,000.25, against John E. Prestridge, and the other for \$35,022.21, for money paid out and expended by appellees for the firm of Prestridge & Knox.

The administratrix objected to the allowance of these claims, and pleaded as to each—1st, non-assumpsit ; 2d,

Prestridge, Adm'r, v. Patrick Irwin & Co.

want of presentation of claim within eighteen months after grant of letters testamentary; 3d, statute of limitation of three years; 4th, want of proper affidavit to the claim. The judgment entry recites that "an issue as to the correctness of these claims having been made up under the direction of the court, the court found all the issues in favor of the plaintiffs," and allowed the first claim to the amount of 30,306.74, and the second to the amount of \$4,597.92.

No objection to the verification of these claims appears in the bill of exceptions, and the record does not show what the verification was. The only recital, in relation to the matter, is as follows, in the bill of exceptions: "It was proved by the plaintiffs, by the records of the court, that letters of administration were granted Sarah F. Prestridge on the 23d of March, 1867; that the estate was declared insolvent on the 11th day of May, 1868, and that both claims were filed in the probate court of Dallas county, Alabama, on the 4th of June, 1868, and were endorsed, 'Filed June 4, 1868. John F. Conoley, judge of probate,' and that both of said claims appear on the docket of claims filed against insolvent estates in said court." The bill of exceptions further recites that both claims had been presented to one McCraw, within eighteen months after the grant of letters of administration, and endorsed by him, "presented," &c.; that said McCraw was the agent and attorney of the administratrix for receiving the presentation of claims; that as such agent he had received presentation of all claims, and had endorsed them as presented, signing the administratrix's name, some times "per S. N. McCraw," and some times "per Heflin & McCraw."

It does not appear, either from the record or bill of exceptions, what evidence was before the court on the trial of the issues, joined on the pleas.

On the trial, the appellees offered in evidence a letter purporting to have been written to them by John E. Prestridge, which was objected to, on the ground that it was not material; but upon the offer of appellees to connect with other evidence, the court, against the objection

Prestridge, Adm'r, v. Patrick Irwin & Co.

and exception of the administratrix, permitted it to be read in evidence, upon proof being made of its genuineness. This letter was dated November 2, 1865, and stated that the writer was desirous of purchasing and shipping cotton to appellees; that to do this he would have to raise money. The writer requested the appellees to inform him what they could do in the matter, and to make him a proposition, &c.

The appellees then introduced one W. S. Knox, who testified that he was a partner in the firm of Prestridge & Knox, and proved the signature of the said Prestridge to the various letters and drafts which were introduced in evidence, and hereinafter noticed, with the exception of two, which were drawn by the witness for the firm of Prestridge & Knox. This witness testified that the account against Prestridge & Knox was presented to him soon after Prestridge's death, which occurred in the latter part of February 1867, and that this account was correct; that he knew nothing of the correctness of the claim against Prestridge, individually, but had often heard Prestridge say, during the winter of 1866 and 1867, while trying to negotiate loans of money, that he was largely indebted to appellees, and for that reason would not draw on them; that he knew Prestridge was in the habit of buying and shipping cotton to appellees, up to within a few weeks of his death; that Prestridge's habit was to draw upon appellees, discount the bills in bank, and with the proceeds purchase cotton, which he shipped to the appellees, to be sold and placed to his credit.

The appellees then offered in evidence the following letter:

"Selma, Feb. 12, 1866. Messrs. Patrick Irwin & Co.: Gents—I received to-day, per Pioneer Express Company, cash package containing ten thousand dollars (\$10,000); also, account sales six bales cotton. Very respectfully, J. E. Prestridge, per Shearer."

Edward Shearer was then introduced as a witness, and testified that at the date of the letter, and some time before and after, he was a clerk for Prestridge in a grocery

Prestridge, Adm'x, v. Patrick Irwin & Co.

store ; that the cotton transactions were not done in the grocery store, and witness had nothing to do with them ; that he had written two or three letters for Prestridge, at the latter's request, and that he had never written any letters without his request, and would not have written any letter without such direction ; that witness did not receive the money referred to in the letter, and did not know that Prestridge received it ; that "all he knew about the letter was, that it was in his handwriting, and he would not have written it without a request from Prestridge." It was further proved in this connection, that the original express receipt had been lost, and that an attempt had been made to get a duplicate, but this was unsuccessful, the Pioneer Express Company having before that time ceased to do business.

The administratrix objected to the admission of the letter, because the witness did not prove that he was authorized to write it, and had no knowledge of it except that it was in his handwriting ; and, also, that it was not stamped as a receipt for money, and had no United States internal revenue stamp upon it. These objections the court overruled, and the defendant excepted.

The court then permitted the appellees to introduce in evidence, against the objections of the administratrix, two letters written to appellees by Prestridge in the year 1865, and one written in February, 1866. The letter dated December, 1865, advised appellees that he had drawn on them at sight for \$10,600, and earnestly requested that the draft be honored, as he would immediately forward the cotton bought with this money to meet the draft.

The other letter related to drafts drawn by Prestridge on the appellees, and notified them of his prospects and business, &c. Each of the above letters were offered in support of particular items, such as drafts, &c., to which they referred

The appellees introduced a receipt for \$1,500, signed by Prestridge, dated June 15th, 1866, which stated that the money was received on account.

After the witness, Knox, had testified, the appellees

offered the depositions of Sheffield and Horton, and the administratrix moved to suppress these depositions on the ground that there was no certificate of commissioner, and objected to reading what purported to be the certificate of commissioner, because it was not stamped as required by the laws of the United States. The certificates of commissioner attached to these depositions were in all respects regular and sufficient, but there was no internal revenue stamp on them.

Attached to each of the depositions was a copy from the books of appellee of the accounts, and, also, drafts proven to have been drawn by Prestridge, corresponding in date and amount to those charged against Prestridge and Prestridge & Knox in said accounts.

Sheffield testified that during part of the year 1866, and all of 1867, and at the time of Prestridge's death, he was book-keeper for appellees, and at that date Prestridge owed appellee \$111,451.25, and was entitled to a credit of \$97,009.97, showing a balance against him of \$24,441.28 on the 1st day of June, 1867; that Prestridge & Knox owed appellees \$3,708.86 on the 1st of June, 1867, and that no payments had, to his knowledge, been made on these accounts since then; that he had no personal knowledge of the accounts prior to December, 1866; that he knew, of his own knowledge, that the drafts after December, 1866, were paid by appellees; that it was the custom of cotton and commission merchants to pay drafts drawn on them by cotton speculators and others to whom they advanced, without regard to their having funds in their hands, according to the confidence they had in the persons to whom they thus advanced; that large drafts for the money drawn by Prestridge were honored when he had no funds to draw against, and that much of the money so drawn was never invested in cotton and shipped to the appellees, or returned in any manner.

Horton testified that he was book-keeper and cashier for appellees from April 1st, 1866, until January, 1867 (and assisted some in the three previous months), and was their cashier and account of sales clerk up to April 20th, 1868;

Prestridge, Adm'r, v. Patrick Irwin & Co.

that the accounts made out from April 28, 1866, up to June 1st, 1867, were correct within witness' own knowledge; that all the items, both credit and debit, on the account prior to April 28th, 1866—namely, from November 1st, 1865, to April 28th, 1866—were correctly copied from the original entries; that all the items in the account against Prestridge & Knox were correct, within his knowledge; that he was in the habit of making entries, &c., from personal inspection of the drafts, &c.; that witness was sales clerk and cashier, after he ceased to be book-keeper, until April 20th, 1868; that up to that time, no payment had been made upon either account, except as therein credited, that if payment had been made in any of the usual modes of business, he would have been apprised of the fact, as it was necessary for him to keep the cash straight, and this he could not do without an account of all moneys received and paid out.

The first debit item on the account against Prestridge individually was dated November 10th, 1865, and the last was on the 9th of February, 1867. The first credit item was December 18th, 1865, and the last was March 5th, 1867.

The first debit item in the account against Prestridge & Knox was dated Dec 14th, 1866, and the last dated February 16th, 1867. The first item of credit on this account was dated January 14th, 1866, and the last, April 6th, 1867. The administratrix then claimed the credits as admitted in each of said accounts, and these reduced the accounts to the amount for which they were respectively allowed; and hence this appeal.

The errors assigned are (among others), admitting in evidence the receipt for \$10,000, signed by Shearer; admitting in evidence the various letters and drafts, overruling the motion to suppress the depositions of Sheffield and Horton; in rendering the decree rendered in the cause.

BROOKS, HARALSON & ROY, and W. E. BOYD, for appellants.
FELLOWS & JOHNS, *contra*.

(The briefs did not come into Reporter's hands.)

B. F. SAFFOLD, J.—The appeal is taken from the decree of the probate court allowing certain claims of the appellees against the insolvent estate of Jno. E. Prestridge.

The letter of Prestridge, written by Shearer to the appellees, on the 12th of February, 1866, is not a receipt requiring a stamp. It is a mere letter of a correspondent, communicating notice of the present condition of mutual business. This appears from the letter itself, and from the statement in it that the money was received through an express company, whose business it was to take a formal receipt. If Shearer does not remember writing the particular letter at Prestridge's request, he testifies that he did write some letters at his request, that this one is in his handwriting, and that he never wrote any letter for him without his request. He was Prestridge's clerk in a grocery store. His testimony connects Prestridge with the letter, which was *an* admission of the receipt of the money specified, and was admissible in evidence.

As the law requiring a revenue stamp to be affixed to the certificate of a commissioner to take depositions has been repealed, the objection on account of the want of a stamp is now untenable.

The letter of Prestridge, written to the appellees, and his drafts drawn on them, accepted by them, and in their possession, were certainly proofs of transactions between the parties, tending to establish the justice of their claims against him. Supported as they were by the testimony of Knox, the account, up to the 28th of April, 1866, seems to be well sustained. After that date, the witness Horton, proves, from his personal knowledge, the remainder of the account.

No objection to the verification of the claims appears in the bill of exceptions, and it is not stated how this was done in any part of the transcript. It appears that in making up the issue, there was a plea of want of proper verification, which was found against the defendant,

Costley et al. v. Towles, Adm'r.

whether on the facts, or a construction of law is not shown. The briefs of the counsel for the appellant admit that there was a verification by Sheffield for the claimants, and the ground of their objection was, that his testimony in the cause shows he was ignorant of the correctness of the claims. Nevertheless, there was a formal and apparently complete verification, even if really defective or insufficient. This deficiency was supplied by proof before the final decree. Section 2196 is in this respect different from the corresponding § 1847 of the Code of 1852.

An account between the merchants is closed at the date of the last item. It is from this time that the statute of limitations begins to run.—Add. on Contracts, 1204. The amount due in this case was the balance of the account on the 5th of March, instead of 1st of June, 1866, with interest to the date of the decree. The error in this respect is probably too inconsiderable to require amendment, and is doubtless in favor of the appellant.

The decree is affirmed.

COSTLEY ET AL. *vs.* TOWLES, ADM'R.

[BILL IN EQUITY FOR ACCOUNT, &c.]

1. *Bill for discovery and account; when properly filed.*—Where the funds of a partnership, dissolved by the death of one of the partners, have been used by the survivor in the business of his partnership with another, the administrator of the deceased partner may recover the interest of his intestate by a bill for discovery and account against the representative of the survivor who has died, and his surviving partner.
2. *Same.*—In such a suit the complainant may recover against the said surviving partner the amount found due from him to the first partnership, that being the prayer of the bill, and there being an agreement between him and the administrator of the other partner that he should settle the partnership matters.
3. *What objection can not be made for first time in the Supreme Court.*—The objection that the complainant is administrator only by appointment

Costley et al. v. Towles, Adm'r.

of a court of the late Confederate States, can not be made for the first time in this court.

APPEAL from Chancery Court of Chambers.

Heard before Hon. B. B. McCRAW.

The bill was filed by John C. Towles, as the administrator of the estate of Henry L. Wilkerson, deceased, against Warrenton Costley and Samuel Spence as the administrators of the estate of James W. Killam, deceased. The essential facts of the case are these: Wilkinson & Killam were partners for some time before 1862, when Wilkinson died intestate and Towles was appointed administrator of his estate. After Wilkinson's death, Killam & Costley formed a partnership to purchase cotton. They bought about fifteen thousand pounds of cotton at twenty cents a pound. The bill alleges that Killam used \$1675.00 of the moneys of the late firm of Killam & Wilkinson to pay for this cotton, and Costley had notice that the funds thus used belonged to said firm. After this Killam died intestate and Spence was appointed administrator of his estate. It was therefore agreed between Towles and Spence, as administrators aforesaid, that Towles should have the management and settlement of the affairs of the late firm of Killam & Wilkinson. It is further alleged, that after Killam died, Costley took possession of 9,000 pounds of the cotton and sold the same for about \$4,500; and Costley also loaned 6,000 pounds of said cotton to one Fuller & Brother. At that time said cotton was worth about 50 cents a pound. Costley paid some debts of Killam & Wilkinson, in the city of New York, with the proceeds of said cotton. The bill alleges that the interest of the said firm of Killam & Wilkinson in the proceeds of said cotton was one-half thereof, and that Costley was liable to account for the same, which was about \$3,950, less one-half of expenses for selling the same. It is also shown that Costley refuses to account with Towles for any portion of the proceeds of said cotton, except upon condition that he be allowed credit for the full amount of the debts paid for said firm, which were so paid with the pro-

Costley et al. v. Towles, Adm'r.

ceeds of said cotton, and at about one-fifth of their real value, as shown on the face of the notes thus paid. The bill prays for a discovery of the value of the proceeds of the cotton and for an account and general relief.

Costley answered and demurred for want of equity. Spence also answered and admitted the material allegations of the bill. The chancellor overruled the demurrer and decreed the relief asked. From this decree Costley appeals to this court, and here assigns the overruling his demurrer and the decree of the chancellor for error.

GOLDTHWAITE, RICE & SEMPLÉ, for appellants.—1. Killam & Wilkinson were partners. The bill and decree alike disregard the settled law as to the rights and interests of surviving partners of a mercantile firm.—Parson's on Part. p. 440, *et seq.*

2. The agreement between the administrators of Wilkinson & Killam had no legal validity. The law will not tolerate it and enforce it. It breaks in upon the settled course of administration prescribed by the law itself. Public policy also forbids such agreements by administrators. Without this agreement the bill is clearly destitute of equity.

W. H. BARNES, *contra.*

(Appellee's brief did not come into Reporter's hands.)

B. F. SAFFOLD, J.—The appellant, Towles, as the administrator of Henry L. Wilkinson, filed his bill praying for an account between the defendant Costley and the firm of Killam & Wilkinson. Samuel Spence, the administrator of Killam, was made a defendant. The grounds upon which the account is claimed are as follows: Costley & Killam being partners in the purchase of cotton, bought 15,000 pounds of cotton at 20 cents per pound; \$1675 of the amount paid were funds of the dissolved partnership of Wilkinson & Killam, used in this manner with the assent and concurrence of Towles, Killam & Costley. Kil-

lam having died, Costley, as surviving partner, sold 9,000 pounds of the cotton in New York, at 50 cents a pound, and loaned 6,000 pounds to Fuller, at a time when the price was 40 or 50 cents a pound. With the money obtained he bought claims against the firm of Wilkinson & Killam, and drugs which he afterwards sold on his own account, on a profit. The answer of Costley, though different in some respects from the allegations of the bill, does not materially vary the legal effect of the above statement.

The report of the register, on a decree of reference, ascertains, among other things, that \$577.50 of the assets of Wilkinson & Killam, were used by Killam, after the death of Wilkinson, in payment for the cotton, and that after the death of Killam, Towles advanced to Costley, for the same purpose, \$1,100, from the same source. The decree was in favor of the complainant for the balance found due from the defendant Costley to the firm of Wilkinson & Killam. Some exceptions were taken by Costley to the report of the register, which were overruled. As they are not pressed by his counsel, and seem not to be material or indicative of substantial error, we will not consider them.

The principal questions arise on the demurrer to the bill, on the grounds of want of equity, multifariousness and non-joinder of parties.

Killam appropriated some of the assets of his former partnership with Wilkinson to the use of his partnership with Costley. For this his representative was liable to account to the complainant. Again, it was the duty of the complainant to collect the assets of his intestate, and to this end he was entitled to join the surviving partner of Killam with his representative, in order to have a full account of all the assets properly chargeable against the estate of Killam.—Story's Eq Plead. § 178; *Long v. Majestree*, 1 Johns. Ch. R. 305.

The virtue of agreement between the complainant and Spence consists mainly in this; that the only matter in controversy between the two estates is this unsettled business of Killam & Costley. Killam's estate is responsible to Wilkinson's for the profits made by the use of their

Dudley et al. v. Witter pro ami.

partnership funds, and entitled to one-half of the profits accrued from the partnership of Killam & Costley of the proportion of the assets of his partnership, to which both of the estates are entitled, will terminate all controversy. The demurrer was properly overruled.

The rule of law which restricts the right of reducing to possession the choses in action, debts and other rights of actions, to the surviving partner, or his representative, does not apply with equal force in equity, even if the matter of this suit were subjected to its application.—Story on Partnership, §§ 362, 346, and note 1. There was no error in rendering the decree in favor of the complainant. The objection that the complainant is administrator only by appointment of a court of the late Confederate States, can not be made for the first time in this court.

The decree is affirmed.

DUDLEY ET AL. *vs.* WITTER, PRO AMI.

[BILL IN EQUITY TO ENFORCE SURRENDER OF LAND SOLD BY TRUSTEE WITHOUT AUTHORITY, AND TO REQUIRE PURCHASER TO ACCOUNT FOR RENTS AND PROFITS THEREOF.]

1. *Decree of chancery court vesting property ; effect of not recording.*—Recording a decree of the chancery court vesting title to real property, under the statute (Clay's Dig. p. 354, § 57,) was not necessary to its validity, but was notice of its contents, as the record of a deed under the registration laws.
2. *Purchaser ; when chargeable with notice of trust.*—A purchaser of land from a vendor who claims it as his own, but who has no legal title except as trustee for another, is chargeable with notice of the trust.
3. *Order of court authorizing trustee to sell land ; to what sale can not be referred.*—A sale of land as his own, by a vendor who is in possession as trustee of another, can not be referred to an order of court authorizing him to sell, as trustee, made several years before, when it was not so intended by him and the purchaser.
4. *Purchaser, charged with constructive notice of trust ; when should not be considered as trustee in invitum.*—A purchaser charged with constructive

Dudley et al. v. Witter pro ami.

notice only of a trust, should not be held a trustee *in invitum*, when a mere want of caution, as distinguished from fraudulent and willful blindness, is all that can be imputed to him.

5. *Continuance; although matter of discretion, when reviewable.*—A continuance and its terms is a matter of discretion, and not reviewable unless the conditions required amount to an improper and unjust abuse of the discretion.

APPEAL from Chancery Court of Lowndes.

Heard before Hon. A. C. FELDER.

SOME few years prior to 1841, Francis Lewis died intestate in Lowndes county, leaving a widow and seven children, his only heirs-at-law, and a large estate, real and personal. Complainant was the youngest child, and after her father's death, and in the year 1839, she, being then a minor, married one Lampkin, who died in 1856. In 1842, complainant filed in the chancery court of Lowndes, her bill to enforce her equity to a settlement out of her portion of her father's estate. Her husband, and the widow and all the other heirs-at-law, and the personal representative of her father's estate, were parties defendant to the bill. In 1843 a decree was made in that suit, which set apart to each of the children and to the widow their respective portions of the estate, describing with clearness the property, real and personal, embraced in each portion. It was expressly provided by said decree, that the portion so described and set apart to complainant should be "vested and held by the said Mary D. Lampkin to and for her sole and separate use for and during her natural life," &c., and at her death "the said portion of lands, and the slaves with their future increase, to be equally divided among such child or children as the said Mary D. may leave living;" * * * "and after the death of said Mary D., without leaving such child or children alive, or their issue, as above, then such portion of the said Mary D. to vest in the said John B. Lampkin, her husband, but not otherwise." The said decree closed thus: "It is further ordered and decreed, that Hamlin F. Lewis be, and he is hereby appointed trustee for the said Mary D. Lampkin;

Dudley et al. v. Witter pro ami.

that he shall give bond and good security to the register of this court, conditioned that he will account and pay over to the said Mary D., and to no one else, all such sums of money as he may receive as trustee aforesaid ; such bond to be in double the value of the personal estate and double the annual income of the real estate, and that he will account annually in this court, and that he will perform the duties of a trustee faithfully, and also, that he will abide by and perform such order and decree as the court may make touching said trust estate." This decree was never recorded in the county court office, as required by Clay's Digest, p. 354, § 57.

The trustee was one of the brothers of complainant, and a party to said suit and decree, but never gave bond, or accounted, &c.

On the 3d of July, 1846, complainant and her trustee filed an *ex parte* petition in said chancery court, praying that the trustee be allowed to sell the lands for five thousand dollars, that price having been offered therefor. Thereupon a reference was ordered before the register, to ascertain the value of the land, and if the sale would be of benefit. Upon this petition a decree was rendered upon the coming in of the report, which, after reciting the petition, &c., is as follows :

" It is therefore ordered and decreed that the report be confirmed, and that Hamlin F. Lewis, the trustee of Mary D. Lampkin, sell said lands at the sum of five thousand dollars cash, if that price can be obtained, and if not, that he sell the same on a credit of one and two years, and that he invest the proceeds of the sale in another plantation suitable to the number of negroes of his *cestui que trust* ; * * * that the surplus be invested in other negroes, &c., to aid in carrying on said plantation. The purchase of such plantation and negroes must be made with the approbation of the master, whose duty it is to see that they are suitable and proper, and that the right and title is clear and unquestionable, and that sufficient conveyances to said plantation and slaves to be purchased, are made, to secure the same to said *cestui que trust*, to the same uses and

Dudley et al. v. Witter pro ami.

trust, and upon the same terms, as her present lands are now held by her trustee. It is further ordered, that the master report, at the next term of this court, what shall have been done in the premises, and that said trustee account annually, in this court, touching the profits of said plantation and slaves, and that he pay the costs of this petition out of the estate of his *cestui que trust*."

No report was ever made to the court of any sale under this order, and no accounts were ever filed by the trustee. Dudley did not know of this order at the time he purchased, but insists that, especially under the circumstances of this case, the sale should be referred to the power of sale given in the decree of 1846. Nothing whatever is said in reference to this decree in the conveyance from Lewis and Scott to appellant Dudley.

About 1847 or 1848 the said John B. Lampkin, the husband of complainant, removed her and the personalty (slaves) of her separate estate from Lowndes county to the State of Mississippi, where complainant lived with her husband until his death there in 1856. After she was thus removed to Mississippi, and in 1851, her trustee, Hamlin F. Lewis, and her brother-in-law, Robert L. Scott, sold and conveyed to John Dudley, for the round sum of \$18,000, twenty-one hundred and twenty acres *in mass*, part of which was, by the terms of the conveyance, to be "located and defined upon the terms and conditions of a written contract between the said Robert L. Scott and H. V. Smith." The 720 acres which had been settled on complainant by said decree was sold and conveyed in this mass of 2120 acres, without any price being mentioned or specified for the 720 acres, or any other part of the 2120 acres. At the time of the sale, Lewis was in possession of the land, and had been cultivating it with his slaves for several years. Lampkin and wife had been in possession and cultivating the land with the slaves of the estate continuously from 1840 until the decree of 1846. Soon after this sale, and in 1853, the said Hamlin F. Lewis removed from Lowndes county to Texas, where he died not long after his arrival there, his estate being insolvent.

Dudley et al. v. Witter pro ami.

Not long after the death of her husband (Lampkin) in 1856, complainant, being advised by counsel that she could recover her said lands at law, pursued the advice and brought an action in her own name (she being then a widow,) in the circuit court of Lowndes against said Dudley, to recover her said lands. In the said action she was defeated in the circuit court, and afterwards on appeal in the supreme court, on the ground that the nature of her right to said lands was such that it could not be enforced in a court of law, but only in a court of equity. During the pendency of this litigation at law she married her present husband, Witter, and soon after said decision of the supreme court, to-wit, on the 15th of September, 1860, she, by her next friend, filed the present bill in the chancery court of Lowndes against said Dudley and the personal representatives of his said grantors, Hamlin F. Lewis and Robert L. Scott, to require Dudley to surrender the possession of the lands to her, and to account for the rents and profits from the time he went into possession. The chancellor granted the relief prayed for, and ordered a reference to the register to take and state an account charging Dudley with rents from the 1st of January, 1852, to date, with interest thereon each year at eight per cent., and allowing proper credits for improvements, &c., with interest.

There is no evidence showing that complainant consented to the sale, or acquiesced in it. Nor does it appear how long complainant remained silent after she knew of the sale.

The register submitted a report, in which he charged Dudley with the rents from the year 1852 to date. To this there was an exception, because Dudley was only liable for rents, under the facts of the case, from one year preceding the commencement of the suit. This exception was overruled and the report confirmed, &c.

At the October term, 1870, complainant being ready for trial, Dudley applied for a continuance, so as to examine witnesses to prove that complainant had ratified the sale of the land in controversy, and received of Lewis the purchase-money. The chancellor required, as a condition

Dudley et al. v. Witter pro ami.

precedent before granting continuance—1st, that Dudley give bond in ten days, with sufficient sureties, in the sum of \$30,000, conditioned to pay and satisfy any decree that may be rendered against him or his personal representatives; 2d, that Dudley pay fifty dollars of the costs to the register in ten days; 3d, that if these conditions were not complied with, then the order of continuance is revoked, and the cause to be submitted to the chancellor, with full power and consent to decide the same in vacation; 4th, that defendant was to come to trial by next term, and make no further application for continuance or delay.

The record then states, "said Dudley accepts said terms and conditions."

There is nothing in the record showing that Lewis was ever called upon to account, &c.

The testimony is quite voluminous, and it is unnecessary to attempt to give an abstract of it. It sufficiently shows that Dudley, for between ten and seventeen years, lived in Dallas county, twenty-five or thirty miles from the land, and was intimate with Francis Lewis and his family, frequently visited him before his death, and his family afterwards, and on such visits occasionally passed by the lands, which he knew as the property of said Francis Lewis. It is also clear, from the proof, that Dudley had no actual notice of the claim of appellee to the land, but purchased it in good faith for a valuable consideration, supposing he was obtaining a fee simple title.

The complainant, deducting the time of her minority, and coverture, and involuntary absence from the State with her husband, brought suit as before stated, before her right to do so was barred by the statute of limitations.

The decree rendered, and the confirmation of the master's report, are now, among other things, assigned as error.

WATTS & TROY, MORGAN & LAPSLEY, and R. M. WILLIAMSON, for appellants.—1. We contend, that as to John Dudley, the interest of Mrs. Witter in the land sued for was a secret or concealed trust, of which he had no actual

notice ; and of which he had no constructive notice, because the proof shows that no fact came to his knowledge which would have led a prudent man to doubt the title of Hamlin F. Lewis, or that would have suggested to the mind of a prudent man that Mrs. Witter had any interest in the land. And further, that John Dudley having bought the land for a full price, which he paid in cash, and from a person in the exclusive possession of the land and claiming ownership, the law excuses him from any inquiry into the title deed of his vendor. And further, that the facts known to John Dudley were sufficient to produce on the mind of a reasonable man, a belief that the title to the land had been cast on him by descent from his father, and that it required no title deeds to enable him to derive a perfect title to the lands by descent from his father. And further, that the constructive notice of a trust (not actually known to a purchaser,) is never imputed to him, unless he is compelled to trace the title of his vendor through the channel, and through the channel only, in which the trust appears, or is disclosed by some reference thereto in the title.

And in support of these propositions we cite the following authorities :—*Jones v. Smith*, 1 Hare, 55 ; *West v. Reed*, 2 Hare, 250 ; *Fleming v. Burgin*, 2 Ird. Eq. 584 ; *Leading Cases in Equity*, vol. 2, part 1st, pp. 132, 133 ; *Clay's Dig.* p. 384, Act 1841 ; *Hill on Trustees*, top pp. 768, 769, 773 and note 2 ; *Ib.* top p. 708 ; *Cress v. Phelps*, 2 Root, 420 ; *Dodson v. Simpson*, 2 Rond. 297 ; Judge Carr's opinion in *Geoff v. Castlemore*, 5 Randolph, 209 ; *Wollwyn v. Lee*, 9 Vesey, 31 ; *Story's Eq. Juris.* vol. 1, §§ 399, 400 ; *White Tudor's Leading Cases in Equity*, vol. 2, p. 1, p. 132 ; *Miles v. Langley*, 1 Russ. & Myln, 40 ; *Ware v. Egmont*, 31 Law & Eq. Rep. p. 89 ; *Hare v. Smith*, 14 Vesey 426 ; *Smith v. Jones*, 1 Phillips, (Eng. Ch.) 251 ; *Cathay v. Sydenham*, Brown's Ch. 391 ; *Moore v. Bennett*, 2 Chan. Cases.

2. This doctrine is applied with its greatest force in equity.—2 *Story's Eq. Juris.* section 1502 and notes 1 and 2 ; *Jones v. Powells*, 3 Milne & K. 317 ; *Tiffany & Bullard on Trusts*, pp. 199, 200, 1, 2, 3 ; 1 *Story's Eq. Juris.* § 64c,

§§ 108, 395; Sugden on Vendors, top p. 507, and pp. 2, 3, 4 and 5; see 15, 16, 17, and § 13, top p. 511.

3. The conduct of Mrs. Witter in filing her petition to have the land sold, and her acquiescence in Dudley's purchase and possession for more than five years estops her in equity from insisting that Dudley had constructive notice of her trust.

As to this land she was a *feme sole*, and could part with her right to it in any way not prohibited by the terms of the decree under which the trust was established.—*Johnson and Wife v. B. Greene*, 17 B. Mon. 118; 2 Story's Eq. Juris. § 1390 and note 1, § 1502, and notes 1 and 3; *Robinson v. Smith Cullom*, 39 Alabama; *Jones v. Bowles*, 3 Mylne & K. 317; *Tiffany & Bullard on Trustees*, pp. 199, 1, 2 and 3; *Baker v. Gregory and Wife*, 28 Ala. Rep. 544; *Blevins v. Buck*, 26 Ala. Rep. 292; *Ozley v. Eilkelheimer*, 26 Ala. 332; *Mather and Wife v. Smith*, 28 Ala. 569; *Cord Husb. and Wife*, § 262; *Gardner v. Gardner*, 22 Wend. 526; *Tiffany & Bullard on Trustees*, p. 649, and cases cited, note (1,) and 65, 7, 8; 689, note (1,) 686 and 689; *Jaques v. M. E. Church*, 17 Johns. 548; *Burch v. Breckenridge*, 16 B. Monroe, 482; *Bradford and Wife v. Greenway*, 17 Ala. 797, *Purveyar v. Puryear*, 16 Ala. 486; *Watters v. McPherson*, 17 Ala. Rep.; *Stone v. Britton*, 20 Ala. Rep.; *Smith v. Monday*, 20 Ala. Rep.

These cases also show that the conveyance of Davis to Dudley, was so executed as to pass the trust estate of Mrs. Witter to the purchaser.

Judge Byrd, in the opinion delivered in this case, when before in this court, says that a sale by a trustee appointed by the court of chancery on an order of the court, the legal title having been vested in him for the purposes of the trust, passes no title until the sale or deed is confirmed by the court. This is said in answer to the argument then submitted that the sale by H. F. Lewis, under the order of the chancellor in 1846, passed the legal and equitable title to Dudley. The opinion by Judge Byrd, if correct, is conclusive against the appellant, so far as the authority of H. F. Lewis to sell under that order is concerned. It is there-

Dudley et al. v. Witter pro ami.

fore desired that this court will give the correctness of this opinion an unbiassed investigation. It may be that the final disposition of the case will depend upon the decision in point—if it be decided adversely to the opinion of Judge Byrd—and favorably to the view which we shall take of it in this argument. It will be unnecessary to decide the other questions involved in the record.

That the order of 1846 did give H. F. Lewis authority to sell the land in controversy is not controverted; but the objection to the validity of the sale is, that he did not sell in pursuance of the terms of the order.

In what character was H. F. Lewis authorized to sell said land? He was already the trustee of Mrs. Lampkin; the legal title was previously vested in him by decree of the court; the order expressly directs that H. F. Lewis, the trustee of Mary D. Lampkin, sell; the petition of Lewis and Mrs. Lampkin prays that Lewis, the trustee of Mary D. Lampkin, be allowed to sell and convey the said lands at a fixed price, and to invest the purchase-money, &c. Lewis is not required to report said sale for confirmation. In addition to the authority to sell, he was directed to invest the proceeds of sale with the approbation of the master, and the master, not Lewis, is to report what had been done as to investment. Does this look like Lewis was to act as an officer of the court? He, as trustee, was directed to sell. There was no necessity that he should report to the court, that he has sold for confirmation; the price had been fixed by the court; he was directed what he should do with the proceeds; that he should invest them under the direction of the master, and the master was directed to report what had been done in the premises at the next term of the court. Now, be it remembered, that under this order everything that is required to be shown to the register, (and of course all the register was called on to report,) was how the proceeds of the sales had been invested. Could this have been done at the then next term of the court, if Lewis had not sold the land and collected the money before that time? Could the chancellor have contemplated that Lewis would have found a pur-

chaser, made a contract of sale, collected the money, and then for that purchaser to wait till the next term of the court for the chancellor to say if the purchase should stand and he receive a deed for the land? It was unreasonable to have expected Lewis to do all this. It was contrary to the usual course of dealing among men, and only the most explicit language should be so construed. A confirmation of a sale under a decree is necessary when the terms of sale may not be beneficial to the parties; but when the terms of sale are fixed, the price to be obtained, and what is to be done with the proceeds, it is entirely unnecessary.

It was not necessary that the sale be confirmed to pass the legal title, for that was already in H. F. Lewis. It was not necessary to secure a fair price, for that was fixed by the chancellor; it was not necessary for the purpose of re-investing the proceeds of sale, for that was expressly directed by the order, and that it should be done under the supervision of the register. The order contemplated that the land should be sold, the money collected (if sold for cash), and invested under the direction of the master before the next term, for at that time the register was to report. Is it not strange that all these things should have been contemplated, and that that act of the transfer conveying titles, out of which those very things alone could spring, should not have been authorized? It would be a strained construction in a case of doubtful language. Here, after directing that the register shall report, &c., it is directed that the trustee shall account for the rents and profits of "said plantation and slaves." What plantation and slaves are referred to under the word "said?" Those to be purchased by Lewis with the proceeds of the sale of the land in controversy? The authorities referred to by Judge Boyd do not sustain the application of the principles to this case. In the case in 3 Sneed, the sale was made by the register, and the legal title was undivested and outstanding in their persons. In the Maryland cases the sale was made by a "trustee of court," similar to our register. In all of the cases the sale was made by an officer of the court, and the theory of sales of that character (1 Smedes

Dudley et al. v. Witter pro ami.

and Mar. Ch. p. 522) is, that the court is itself the vendor, and the officer the mere agent of the court. But it will be observed in all the class of cases, that the legal title is outstanding in some persons who do not participate in the sale. A. cannot sell and convey the legal title to B.'s land without some judicial divestiture of the title out of B. If A., however, has the legal title in him, and B. a right to the use or profits, a bare authority to A. to sell is sufficient, particularly when the price and terms of sale and the disposition of the proceeds are fixed by the order of sale. The purposes for which a confirmation required are wanting, and the not doing an unnecessary thing should not vitiate the sale.—*Jones & Blair v. Bende*, 20 Ala. 382.

We think, then, the order authorized Lewis to sell the land as trustee of Mrs. Lampkin, and as he already held the legal title by previous decree of the court, it was not necessary that he should be specifiedly authorized to convey the legal title, and that the sale did not require confirmation, as he was directed in all things how to proceed.

2. Was the order of the chancellor in 1846 a continuous authority, or was its force spent at the next term of the court? The direction given to the trustee by the order, shows that the chancellor contemplated that the trustee might not comply with its terms by the next term of the court. If he could not sell for cash he was to sell on one and two years credit, and in either event he was directed how to apply the proceeds. He was not to report to the court, but to the register, that he had sold, after he had collected the purchase-money, which would not occur for two years after the date of the order. That he was to report to the register after the purchase-money was collected, is implied from the direction in the order that the investment was to be made under the approbation of the register; and then only was he to report at all. This contemplates at least a period of two years after the order before the trustee could have acted under the order in making investment. It might have been longer, for he had to find a purchaser at a given price, which would require time. The trustee is required to account annually

in the court for the profits realized from the land and slaves to be purchased by him with the proceeds of the sale of the land. Until profits arise from the new purchase, he is not called on to make any report to the court. Here the order shows that its terms could not, in one event—a credit sale—be complied with till after two years, and the only matter the trustee is called on to report to the court (profits arising from the new purchase) might not have arisen in five or ten years.

Was the sale an execution of the power to sell under the order of 1846? The tendency of ruling upon this question in England and this country is to a liberal construction, to effectuate the execution of a power, and the principle is, that if a will or deed be made, without any reference to the power, it operates an execution of the power, if it can not have operation without the power.—Sugden on Power, 297, ed. 1823; *Bradish v. Gibbs*, 3 Johnson C. R. p. 551; *Bishop v. Resople*, 11 Ohio (O. S.) 277.

A reference to the matter (property) is sufficient to indicate the intention to execute the power, although no reference to the instrument creating the power be made. If the property be specifiedly named or described, it is sufficient.—*Bishop v. Resople*, *supra*; *Morey v. Michael*, 18 Mo. 241; *Blagg v. Miles*, 1 Story C. C. R. 427.

The cases draw a distinction between the execution of power by will and by deed, and the rule is more strictly applied to wills than to deeds. Judge Story, in the last case cited, classes the cases in which the power is properly executed.

1st. When there has been some reference, in the will or other instrument, to the power; 2d. or a reference to the property which is the subject on which it is to be executed; 3d. or when the provision in the will or other instrument executed by the donor, if the power would otherwise be ineffectual or a mere reality; in other words, it would have no operation except as an execution of the power. The deed of H. F. Lewis and Scott specifies the property by particular description, and could have no operation as to that land, except by way of execution of the power. The

Dudley et al. v. Witter pro ami.

English parliament have done away with the technical niceties which formerly embarrassed the execution of power, by declaring that a general devise of real or personal property shall operate as an execution of a power of the testator over the same, unless a contrary intention shall appear on the will"; and this, Judge Story says, is a doctrine which would seem to be the dictate of common sense.—See Note, 1 Story, (C. C.) Rep. p. 458. Did the facts that the deed from Lewis and Scott to Dudley embraced other lands than those held by Lewis as trustee, and that Scott and wife joined in the deed, defeat the deed as an execution of the power to sell. There is no reason why it should. Lewis was required to attain \$5,000 for the 720 acres. The sale shows that by joining the same with other lands owned by him and Scott, he obtained about \$6,000 for the same. In addition, it is presumable that it brought a better price on account of the covenants of warranty by Lewis and Scott. The effect, then, of the mode of sale, was the security of title to the purchaser and consequent better price for the land. This furnishes a reason for the particular mode of conveying in this case, perfectly consistent with the execution of the power of sale by Lewis, and in furtherance of the interest of the *cestui que trust*. Does the joining of Scott and wife in the deed vitiate it, as the execution of the power by Lewis? The circumstances surrounding the sale to Dudley, show that several parcels of land were sold to D., some of which belonged to Lewis and Scott, and the land of complainant which Lewis was authorized to sell. It could not defeat any of the purposes for which the power was given to Lewis—a sale of the land and reinvestment of the proceeds. The power authorized Lewis to sell; he did so; and Scott and wife joined him in the deed, conveyed what interest they had and guaranteed the title to Dudley; and instead of being injurious to the interest of the *cestui que trust*, it was beneficial.

When a power is given two or more, generally they should all join in the execution of it; in every case, perhaps, when the legal title is vested in all; but the converse of the rule can not be correct. It might in some cases be

necessary for the benefit of the appointee that others should join the appointor, if not absolutely necessary. Suppose a power of sale to a married woman, and she attempts to execute it during coverture, would her husband not have to join her in the deed? It is only a superadded force to the deed, and, if it is good without that, it will not vitiate it. *Dillon v. Grace*, 2 Scho. & Lef. 456; *Madison v. Andrew*, 1 Ves. Sr., p. 61; *Stadden v. Stadden*, 2 Ves. Jr., p. 589 Sugden on Power, pp. 291, 296.

Suppose a trustee of an estate for life, with power to lease, should join the remainder-man in a conveyance of the fee. This would undoubtedly be good to convey the life estate and remainder. It is but the dictate of common sense that in any case where an additional guarantee is given the purchaser, and an enhanced price is thereby obtained on a sale under a power, by others than the donee of the power joining in the deed of conveyance, or by embracing other property than that mentioned in the power, (when the very thing which the power authorizes is done,) that the conveyance should stand as an execution of the power, if in all other things it is complied with.

4th. Was John Dudley bound to see to the appropriation of the purchase-money?

The principle upon which a purchaser from a trustee is held to see to the application of the purchase-money is, that the money is to be paid to some particular person, or for some particular purpose, in which the trustee has no discretion, and no time to elapse between the sale and the application of the money. If the trustee is clothed with a discretion, or the application can not reasonably be simultaneous with the sale, the purchaser is absolved from such duty. This question is fully discussed in the case of *Elliott v. Merryman*, in 1 Leading Cases in Equity, top page 97, and in the notes thereto.

RICE, SEMPLE & GOLDTHWAITE, for appellee.—“A wife, by the general doctrines of the court of chancery, has equitable rights, independently of contract or gift, as regards real as well as personal property.” Amongst these, is her

Dudley et al. v. Witter pro ami.

equity for a settlement. "This equity" is "inherent." "The decree does not give her the equity; she has it (that is, the equity,) independently of the decree."—2 Spence's Eq. Jur. 482, 488, and note *e*, referring to *Steinmetz v. Halthin*, 1 Glyn & J. 68. "It is an equity, grounded upon natural justice; it is that kind of parental care which a court of equity exercises for the benefit of orphans; and as a father would not have married his daughter without insisting upon some provision, so, a court of equity, which stands in *loco parentis*, will insist on it."—2 Story's Eq. Jur. § 1407. It is applied to "all cases of the real estate of the wife, whether legal or equitable."—2 Story's Equity Jur. §§ 1408, 1414.

The court in sustaining such bill is, "in truth, enforcing against the husband, her admitted equity to prevent an irreparable injustice."—2 Story's Eq. Jur. § 1404.

This equity may be waived or lost by the misconduct of the wife; but not by the misconduct of a trustee appointed by the court, to preserve it under the continuing supervision of the court.—2 Story's Eq. Jur. §§ 1416 to 1420.

Is it a fair or just construction of the decree of 1846, that the object of the court in making it was to confer upon the trustee the power to sell the separate estate therein created? Was it the object to confer upon him the power to sell, even before he executed the bond therein required of him? Does not the decree, taken as a whole and construed in connection with the bill under which it was rendered, amount to prohibition against alienation by the trustee; at any rate, to a prohibition against alienation by him without his giving the required bond?—*Field v. Evans*, 15 Simons, 375; 2 Spence's Eq. Jur. 522, and notes; *Fears v. Brooks*, 12 Ga. 195.

Why should the court have conferred upon the trustee the power to sell the separate estate? Why did the court require a bond, a heavy bond of him? Why did the court omit to confer upon him any power or prescribe to him any duty, except in the significant form of the condition which he was required to insert in his bond? The court never intended him to do any act as trustee, to exercise any power

Dudley et al. v. Witter pro ami.

as trustee, over the estate, other than merely taking care of it, until he first gave the bond with the condition so carefully and instructively required. (He was to give the bond to the register.)—*Jackson v. Simonton*, 4 Cranch's Cir. Ct. Rep. 260, where the court say: "He could do no act as marshal until he had given the bond required by the statute, and until it had been received by the proper officer;" see, also, *Cleveland v. Chandler*, 3 Stew. 489.

It is perfectly clear, that a guardian or other trustee who, by the very terms of the instrument appointing him, is required to give bond to a designated person or officer, with condition that he will faithfully perform all his duties, has no disposing power over the estate, until he gives such bond and it is received by the person or officer designated. *Cleveland v. Chandler*, 3 Stew. 489.

Looking at the decree which created the separate estate in favor of the complainant in this case, the question is, (in the language of Sir William Grant,) "whether the absolute property (for life), including a power of disposition, was intended to be given; or whether it was a personal gift only, without a power of disposition." Whenever the court sees "from the words, an intention to limit her to a personal gift, without a power of disposition," the court will not permit an interest inconsistent with it to be effectual.—*Wagstaff v. Smith*, 9 Vesey, 520; and *Harvey v. Blakeman*, therein stated and approved; *Fears v. Brooks*, 12 Georgia R. 195. The provisions are all "systematic;" and, therefore, they must be so construed that "every part may take effect according to the intent" of the decree and law.—*Ives v. Lynn*, 7 Conn. R. 514.

Upon reason and authority, the trustee named in said trustee had no power to sell the separate estate; he is evidently a mere trustee "raised up by the court to preserve the separate estate," and the very court of equity which appointed him cannot permit his sale "to defeat the estate."—*Franklin v. Creyon*, Harper's Equity (S. C.) Reports, 552.

In a case not stronger than this is, for the complainant, against the sale of the trustee, Lord Hardwicke said: "If

Dudley et al. v. Witter pro ami.

this had been a bar in point of law, to all intents and purposes, it would be none in equity." * * "Being trustee of this very fund, she (the trustee in the case in which Lord Hardwicke was dealing,) does an act, which is insisted on to be a bar and extinguishment to this trust of hers. On this foundation, therefore, supposing the fine good in law, this court (the court of equity) ought not to bar the equitable right creditors had to this fund for the payment of debts, and also the infante's." * * * "If a practice of this kind was suffered to prevail, a court of equity might as well be abolished by act of parliament." *Pomfret v. Windsor*, 2 Vesey, 482.

Under the decree appointing Hamlin F. Lewis trustee, his power or authority to sell was not other or different from what it would have been had he been called "receiver" instead of "trustee." His duties are specified in the specified condition of the bond required of him, and are those of a receiver.—3 Daniel's Ch. Pl. and Pr. 1949. This specification of his duties excludes and repels the idea of his authority to sell. A sale by him is obviously inconsistent with his duties as prescribed in the decree. *Fears v. Brooks*, 12 Georgia Rep. 199.

The possession of the lands by Lewis was gained by him as, substantially, a receiver under the decree of the court, and for that reason cannot operate to injure the complainant. The court will say to him, in the language of Lord Hardwicke : "You gained that possession, therefore, in confidence, and you shall not by means of that possession, defeat the title of the person for whom you had possession."—*Kennedy v. Daly*, 1 Sch. & Lefr. 380, 381 ; *Pomfret v. Windsor*, 2 Vesey, 481, 482.

It is clear, that unless that possession is allowed to operate to the injury of the complainant, there is not even a decent pretext for saying that Dudley is a purchaser without notice, for that possession was the only *indicium* of ownership which the vendors of Dudley had. Strip them of that possession, and they had not a single *indicium* of ownership, and a purchaser from them could not be a purchaser without notice.

In *Scott v. Davis*, 4 Mylne & Cr. 89, Lord Chancellor Cottenham laid down the following incontrovertible proposition : " That the rights of others to deal with a married woman as a *feme sole*, (or with her separate estate) are limited by the provisions of the gift (whether by deed, will, decree or other instrument,) to her separate use is the principle of all the equitable jurisdiction upon the subject."

From this proposition or principle, it is a necessary sequence, that whoever deals with a married woman as a *feme sole*, or with her separate estate, deals at his peril. If he is a purchaser of such property, the maxim, "*caveat emptor*" applies to him in its utmost rigor ; and want of notice of the limitations contained in " the provisions of the gift to her separate use," cannot be permitted, in a court of equity, to annul those limitations. There would be no real safety or protection of married women as to their respective estates, if the want of notice of " the provisions of the gift " could have the practical effect of creating in their trustees power to sell their separate estates, when, in fact, no power of sale could be found in " the provisions of the gift."

In *Michan v. Wyatt*, 21 Ala. R. 813, our supreme court held and applied this doctrine ; for, in that case, notice to the purchaser was neither alleged nor proved ; he denied notice, and claimed protection as a *bona fide* purchaser without notice. The court decided against him, and for the claim of the wife to her separate estate.

Such separate estates as that of the complainant, that is, separate estates recognized by a court of equity, independently of any statute, are "something more than mere trust estates." Such separate estate is "peculiar in its character." By the doctrine and practice of courts of equity, such separate estates are entitled to a higher and more stringent protection from those courts, than mere trust estates.—Legal and Eq. Rights of Married Women, by Cord, §§ 402, 269, 264, 265, 263.

A trustee like Lewis, appointed by the court, is not the kind of trustee who can convey the legal title. No legal title is expressly conferred on him either by the decree or

Dudley et al. v. Witter pro ami.

other instrument. He takes the legal title merely by implication—merely “to enable him to discharge the duties imposed upon him,” not for any other purpose.—*Witter v. Dudley*, 36 Ala. R. 139.

The only kind of trustee who can sell, without a clear delegation of such power, is a trustee to whom the legal title is clearly and expressly conveyed without any restraint or obligation.

Notice to such a purchaser as Dudley, of such property as he bought, from such a trustee as Lewis, was not necessary, and is not necessary to the preservation and enforcement of complainant's rights to such property.—*Scott v. Davis*, 4 Mylne & Cr. 91, 92; *Michan v. Wyatt*, 21 Ala. R. 813.

“The principle which discharges a *bona fide* purchaser without notice, from liability on account of equities which would affect his grantor, is inapplicable to a case where the consideration, or a material part of it, is an agreement by the grantee, that he will support the grantor and his wife during their lives.”—25 U. S. Dig. p. 513, § 12.

If notice to Dudley was necessary, “the circumstances of the property affected him with notice.”—*Scott v. Davis*, 4 Mylne & Cr. 91–2.

Separate estates are of two classes—1st. creatures of equity courts; 2d. creatures of statutes, or of instruments executed by persons or individuals, such as deeds or wills.

The separate estate of complainant belongs to the first class. It is the mere creature of the court of equity, in the exercise of that original jurisdiction which is inherent in it, and which it has “no right to relinquish.” It is an equitable estate, as distinguished from a legal estate; and the court of equity which created it, has never for an instant relinquished, but still retains jurisdiction over it.—Cord's Legal and Eq. Rights of Married Women, sections 257, 269, 270, 271, 275. And the trustee could not by his sale put an end to this continued and continuing jurisdiction over this particular estate, nor withdraw the estate from the protecting power of this jurisdiction.

The decree, being the instrument which created this sep-

arate estate, must be the test by which to determine the powers and rights of the trustee over the estate. Evidently he had not the power to sell, unless conferred by that instrument. And it is equally evident, that a sale by him, without ever having given bond, is inconsistent with the terms and objects of the decree. The plain words and meaning of the decree, are that "the portion as vested in the said Mary D. be vested and held by the said Mary D. to and for her sole and separate use for and during her natural life." The sense of these words is, that the estate should not be sold by the trustee, nor be taken from her nor be held and enjoyed by a purchaser from him.

At the time of the sale to Dudley, his grantor, Scott had no interest or right in or to said property—constituting the separate estate of complainant; and his other grantor, Hamlin F. Lewis, had no interest or right therein, except such as said decree may have conferred upon him as the trustee therein appointed to carry out its provisions and objects.

Dudley's claim to protection is based solely on his asserted actual ignorance of "the circumstances of the property." If such actual ignorance is available to Dudley, it is equally available to all other like purchasers of like property from like trustees. To hold that there is any rule which gives such effect to such ignorance, is to place all such separate estates "virtually out of the pale of the law;" for all that is necessary, under such a rule, to defeat the provisions made by the courts for the protection of married women, is that the trustee should select a purchaser who has the requisite measure of ignorance, and make a sale to him for valuable consideration. Courts of equity can never forget that such separate estates are their own creatures—and creatures "inconsistent with the ordinary rules of property," (*Tullett v. Armstrong*, 4 Mylne and Cr. 390;) and that the only justifiable end of their creation, was the security of married women against want, which security the courts of equity felt was due to them and could not be attained without the exercise of the transcendent power of

Dudley et al. v. Witter pro ami.

those courts, inconsistently "with the ordinary rules of property."—*Tullett v. Armstrong, supra*.

Courts of equity can not excuse such ignorance; especially when, as here, it cannot operate merely as a shield to the purchaser, but must operate, if it operate at all, as an instrument of destruction against married women, and married women who were profoundly ignorant of the sale by the trustee at the time it was made, and who were and are free from fault.

It is impossible to hold, that the equities of such a purchaser and of a married woman for whom such a separate estate had been created by a court of chancery, are equal. The equities of such parties are not equal. "There is some balance on the one side for not enquiring; none on the other."—*Franklin v. Creyon*, Harper's Equity, (S. C.) Rep. 253; *Michan v. Wyatt*, 21 Ala. R.; *May v. Nabors*, 6 Ala. R. 24; *Lucas v. Kernodle*, 2 Ala. R. 199; *Keech v. Hall*, Douglass R. 22, cited and approved in *Chapman v. Glassel*, 13 Ala. R. 55; *Nelson v. Allen*, 1 Yerger, 366.

In such case, the mere fact that the trustee had at a former period owned a partial interest in the property, as one of several heirs at law of a former owner, can make no difference.—*Lucas v. Kernodle*, 2 Ala. R. 199; *May v. Nabors, supra*, 25 U. S. Dig. p. 514, § 13, 14.

The title to land (*inter vivos*,) can pass only by deed. This is the public policy of Alabama, as well as of other States where the statutes of frauds prevails.—*McPherson v. Walters*, 16 Ala. 714.

In the absence of stipulations as to the title, the law gives to a purchaser the right to require a good title. If, however, he does not exercise this right, but accepts a conveyance, and the seller does not practice any fraud in the sale; and if after this, the purchaser is evicted by a title to which his covenants do not extend, he is without remedy for his loss in any court. If the seller defrauds him, then his remedy is against the seller personally; but the title of the real owner is not affected or impaired. The law requires "the purchaser to apply his attention to those particulars which may be supposed within the reach of his

observation and judgment," (amongst others, to the claim or abstract of the title). "If the purchaser be wanting of attention to those points where attention would have been sufficient to protect him from surprise or imposition, the maxim, *caveat emptor*, ought to apply."—*Cullom v. Branch Bank at Mobile*, 4 Ala. R. 21, and authorities therein cited. *Chapman v. Glassel*, 13 Ala. R. 55, citing and approving, *Keech v. Hall*, Douglass R. 22.

"It is his business to inquire and to look to the person with whom he deals." * * * "He can always be safe, if he uses due diligence; but the other party has no means of safety, beyond his application to the court."—2 Leading cases in Equity, Hare & Wallace's notes, (3d American edition,) 172; *Chapman v. Glassel*, 13 Ala. R. 55, and *Keech v. Hall*, therein cited.

In *Stery v. Arden*, 1 Johns. Ch. R. 267, Chancellor Kent held a purchaser chargeable with constructive notice, who had only heard that the vendor had made some provision for his daughter out of the property.

"Nothing is better established * * * than that a purchaser will have constructive notice of every thing which appears in any part of the deeds or instruments, which prove and constitute the title purchased, and is of such a nature that if brought directly to his knowledge, it would amount to actual notice." * * * "Such notice * * * is of the most conclusive nature, and is insusceptible of being explained away or being rebutted." * * * "When, therefore, its existence appears from the documents or papers actually accompanying the answer, it will overrule a positive denial of notice in the answer itself." 2 Leading Cases in Equity, Hare and Wallace's notes, (3d American edition), 168, 169, 170; citing *Johnson v. Thweatt*, 18 Ala. R. 741, and a number of other like decisions. *Gimon v. Davis*, 36 Ala. R. 589; *Fitzhugh v. Barnard*; *Burch v. Carter*, 44 Ala.; 12 Michigan R. 104; *Parks v. Jackson*, 11 Wend. R. 453; 25 U. S. Dig. p. 514, §§ 13, 14; 24 U. S. Dig. p. 177, §§ 59, 69; 23 U. S. Dig. 167, § 83; 23 U. S. Dig. p. 168, §§ 94, 95.

The pendency of the account decreed in the original suit,

Dudley et al. v. Witter pro ami.

to be made by the trustee, from year to year, to the court, in the matter of the separate estate specifically described in the decree itself, was a *lis pendens*, at the time of Dudley's purchase, and therefore in law notice to him. (This is law in Alabama and other States of the Union, although it may not be in England).—*Bolling v. Carter*, 9 Ala. R. 921; *Hoole v. Attorney General*, 22 Ala. R. 190; *Center v. Pl. & M. Bank*, 22 Ala. R. 733; *The State ex rel. Waring v. Mayor &c. of the city of Mobile*, 24 Ala. R. 701; *Bond v. Hopkins*, 1 Sch. & Lefr. 438; 2 Leading Cases in Equity. Hare & Wallace's notes, 170, 177; *Jackson v. Warren*, 32 Illinois Rep. 332, 340.

It is conceded, that a decree is not implied notice to strangers, after the cause is ended. But when, as here, the decree does not put an end to the cause, but continues and keeps the property (duly described), *sub judice* for the purposes of accounting annually by the trustee to the court, the cause is not "ended," and the decree is implied notice to those who deal with the trustee as to this property.—*Warsley v. Earl of Scarborough*, 3 Atkyns, 394; *Herbert's Case*, 3 Peere Williams, 116; *Earle v. Couch*, 3 Metc. (Ky.) 455, and cases therein cited; *Parks v. Jackson*, 11 Wend. R. 446, 453, 454, 459. *Lis pendens* continues even after decree, sale and conveyance; because the court of chancery is not *functus officio* until the decree is executed by delivery of possession."—*Jackson v. Warren*, 32 Illinois R. 332; *Waring v. Mayor of Mobile*, 24 Ala. R. 701; 1 Shoales & Lefroy's R. 438.

The decree here was in the nature of a decree appointing a person to carry on a trade or business for an infant, and to account annually to the court. Such decrees are pliable, and certainly do not put an end or conclusion to the matter; nor take away the character of *lis pendens*. Until the power of the court over the matter is exhausted by its exercise, the cause is not ended, and does not cease to be a *lis pendens*.—*Waring v. The Mayor of Mobile*, 24 Ala. R. 701; *Thompson v. Brown*, 4 Johns Ch. R. 627, and cases there cited; *Kershaw v. Thompson*, 4 Johns Ch. R. 609; *Earle v. Couch*, 3 Metc. (Ky.) Rep. 455, and the cases there

eited from 4 Dann. 95, and 9 B. Monroe, 228, 32 Illinois R. 332. No *laches* in the prosecution of the case is attributable to complainant; she was a married woman continuously, until after the sale to Dudley in 1851. The court and its trustee are responsible for the omission of the trustee to do his duties. The property was peculiar, and the circumstances also peculiar.—*Johnson v. Johnson*, 5 Ala. Rep. 97. *Laches* not imputable to infants or married women.—*Fears v. Brooks*, 12 Georgia Rep. 195, *et seq.*; *Bond v. Hopkins*, 1 Sch. and Lefr. 429, 420; *Nelson v. Allen*, 1 Yerger's R. 371, 375.

Dudley knew enough to put a prudent and careful man upon inquiry, and inquiry would have led him to the whole truth; therefore, he can not, in Alabama, be treated as a purchaser without notice. *Herbert v. Harrick*, 16 Ala. R. 597. In that case, our courts thus lay down the law: "Want of notice of a fact which is the result of a want of that diligence which the law requires for its ascertainment, furnishes no ground for its protection."—See, also, *Smith v. Zurcher*, 9 Ala. R. 208; *Scroggins v. Douglas*, 8 Ala. R. 382.

The evidence shows that Dudley knew the father of complainant; knew the land was his at his death; knew and was intimate with all the children, &c. Dudley knew far more than the purchaser in *Sterry v. Arden*, 1 Johns. Ch. R. 267, who was held to be a purchaser chargeable with notice. *Gimon v. Davis*, 31 Ala. R. 589, is decisive against Dudley as to constructive notice.

For the distinguishing peculiarities which mark a widow's claim for the allotment of her dower, such claim is not embraced without express mention by the general and sweeping words of the statute of limitations.—*Ridgway v. McAlpine*, 31 Ala. R. 458.

And so, and for like reasons, a decree of a court of equity, enforcing the wife's equity to a settlement, is not a case "where the right and title to property, whether real or personal, shall be decreed to either of the parties," within the meaning of the act of 1841.—Clay's Dig. 354, § 57.

Dudley et al. v. Witter pro ami.

That act (the act of 1841) extends only to cases where the dispute, the real contest between "the parties," is as to "the right and title to property"; for example, such cases as bills for specific performance of a contract as to property.—Clay's Dig. 350, § 29.

A bill to enforce a wife's equity to a settlement is not a case in which the contest and dispute can, with justice or reason, be said to be as to "the right and title to property." Such a claim rests not on contract, but it is a mere "equity." "This equity stands upon the peculiar doctrine of the court." "It rests upon the broad ground that in a court of equity it is regarded as her estate, which she has a right to have expressly set apart and secured, or such portion thereof as may be necessary for the permanent support of herself and children." The court, in such case, does not decree "the right and title to property" to the wife, but sets apart and secures to her what it views as her unquestionable property.—Legal and Eq. Rights of Married Women, by Cord, § 155, *et seq.*; *Murray v. Ld. Elibank*, 1 Leading Cases in Equity, and Hare and Wallace's Notes (Third American Edition), marg. pages 356, 394.

It seems monstrous to impute to the legislature of 1841. an intention to abridge or impair the efficacy of decrees of chancery courts in the exercise of their peculiar and original jurisdiction, setting apart and securing to married women a portion or the whole of their own property; or an intention to subject such provisions of such decrees, to be forfeited or lost by married women, who are not *sui juris*, for the mere omission of the court or its trustee or officer to record the same.

But independent of the foregoing view, as the father of complainant had died intestate, and her right as one of his heirs at law to her portion of his estate had accrued and attached before the passage of the act of 1841, it is certain that the legislature of 1841 did not possess any constitutional power to declare that the title of the wife to her property be divested for the want of registration," &c.—*Edrington v. Manfield*, 5 Texas Rep. 363; *McCabe v. Emer-*

son, 18 Penn. State Rep. 111 ; Sedgwick on Stat. and Cons. Law, 196, 197 ; *Warick v. Paiggs*, 6 Paige, 332 ; 22 Wend. 549.

The act of 1841 has no retrospective operation. It does not effect or apply to a decree making a settlement for her out of property which accrued to her from the death of her father, intestate, before 1841.—*Thrasher v. Ingram*, 32 Ala. R. 645 ; *Sterns v. Weathers*, 30 Ala. 712 ; Sedg. on Stat. and Cons. Law, 194, 199.

This view of the act of 1841 is supported by the following additional authorities, which speak directly upon the proper mode of construing registry acts. According to these authorities, the decrees which are embraced by the act of 1841 are such as are there substitutes for the ordinary transfers of property "made by the act of the parties, viz, from a former owner to a new owner ;" and decrees of a "peculiar" jurisdiction, and having by law a peculiar effect, are not embraced.—3 Kent Com., 9th ed., 149 ; *Bloxom v. Hubbard*, 5 East, 422 ; *Yallop, ex parte*, 15 Vesey, 68 ; *Curtis v. Perry*, 6 Vesey, 740, 746.

The right here asserted by complainant is not derived from any grantor of Dudley, but (through the court of equity and the law of the land,) from her deceased father, a source above and independent of any grantor of Dudley. *Stuyvesant v. Hall*, 2 Barb. Ch. 151. True, by our statutes of descent and distribution, the grantor of Dudley, from the death of complainant's father up to the original decree in favor of complainant, (in 1843,) had an undivided interest with complainant and the other heirs-at-law of her father, in the whole of the estate of her father, the whole, until then, being undivided. But until that decree, neither complainant nor any grantor of Dudley had any specific right or title to the specific portion which, by that decree, was set apart for complainant ; and that very decree also set apart to the grantor of Dudley, and to each of the other heirs, and the widow, their respective portions of the whole estate, and thus extinguished the entire right of each heir, and of the widow, to every part of the estate except the particular portion set apart to him or her.

Dudley et al. v. Witter pro ami.

That decree made compensation to each heir for this extinction of his undivided interest in the whole estate, by setting apart to each, in lieu thereof, specific and equal portions in severalty. After that decree, the grantors of Dudley had no right whatever to the portion set apart to complainant, except such right as the decree may have conferred upon Hamlin F. Lewis as the trustee therein appointed by the court for complainant. Dudley purchased after this decree, and did not purchase from any grantor of complainant. It is only the creditor of, or purchaser from, such grantor, (a grantor of complainant,) that can raise against her the question of registration. It is only the interest of such grantor that can be reached, even where the want of registration operates most strongly. *Edrington v. Mayfield*, 5 Texas, 363; 24 U. S. Dig. 176, §§ 44, 47; *ib.* 177, § 68.

Even if Dudley's grantors had a partial interest of two-sevenths, he would still be a purchaser with notice of the other five-sevenths, and therefore a purchaser with notice *in toto*.—*May v. Nabors*, 6 Ala. —, and cases therein cited. The law does not recognize any such thing as a purchaser with notice as to only part of one entire tract held under the title of the same intestate by his heirs at law.—25 U. S. Dig. 514, §§ 13, 14. If the purchaser had notice as to part, that made him, in law, a purchaser with notice as to all of the tract, and all of the common interests of the heirs therein.

If there was any duty to register the decree, that duty was not upon the complainant, a married woman, not *sui juris*, but was upon the court, its officer, or the trustee appointed by it. The omission to register the decree can not operate as a forfeiture of her estate, especially as her right accrued before the act of 1841, and at the death of her father. The purchaser from her trustee can not thus claim by forfeiture. The act of 1841 can not give him a greater interest than his grantors had, which was nothing but that of a dry trustee for complainant.

The particular facts stated by Dudley in his deposition, especially in his answer to the complainant's cross-interro-

gations, were sufficient to put him upon inquiry which would have led him to the whole truth. Dudley was related to, and intimate with the father of the complainant, and all the children, for many years. He knew her father died the owner and possessor of the land in controversy. He knew her father left seven children; that Hamlin F. and complainant were two of them; that complainant was the youngest, and was a minor at her father's death, and afterwards at her marriage with Lampkin. When, therefore, Hamlin F. Lewis offered to sell him the land, and claimed to be sole owner, Dudley ought to have inquired how he became sole owner, and how complainant had lost or parted with her right as an infant heir.

The defendant Dudley must be held to the title under which he entered. — *Bond v. Hopkins*, 1 Sch. & Lefr. 420. He must be held to the purchase which he actually made. His own answer shows that, in fact, he did not know of, or buy under, the order of sale made at the June term, 1846; and he is by that answer, as well as by the settled law, *concluded* from resorting to that order to sustain his purchase. This point is entirely closed against Dudley by the decision of this court at its January term, 1868, in the *Annual Conference of the Methodist Church v. Price*.

Another fatal objection to allowing Dudley any benefit from that order, is, that the power of sale in it is, upon the face of the order, limited to the term of the court next after the order. It closes by ordering the master to report at the next term of this court what shall have been done in the premises, &c. It is well settled that a bar by lapse of time may be implied. — *Hollinger v. Holly*, 8 Ala. R. 459; 8 How. U. S. A. 163.

The provision in that order is "systematic," and, therefore, it must "be so construed that all its parts may take effect." — *Ives v. Lynn*, 7 Conn. R. 514. The part which required a report at the next term of what had been done in the premises, could not have effect unless the sale was to be made before that term. See, also, *Lessee of Ward v. Barrows*, 2 Ohio State R. 250, 251.

Dudley et al. v. Witter pro ami.

B. F. SAFFOLD, J.—In this case the appellee sought to require the appellant, Dudley, to surrender to her a certain tract of land in Lowndes county, and to account for the rents and profits thereof, from the time he received possession. Dudley obtained possession of the land in 1851, under a deed from Hamlin F. Lewis and wife and Robert Scott and wife, conveying it as their own property to him in fee simple, and warranting the title, for valuable consideration. The appellee claims that this land was a part of the estate of her father, Francis Lewis, and was set apart to her under a partition of her father's estate, effected by the chancery court at her instance, in 1843, and secured by decree to her sole and separate use for her life, with remainder to her children; that, by the said decree Hamlin F. Lewis was made her trustee, she being married, and having possession of the property as such only, he made an unauthorized sale to Dudley. Dudley replies to this that at the time of his purchase Lewis was in possession of the land, claiming it as his own, and he knew nothing of the claim of the appellee until long after he had paid for it. He further insists that in 1846 the appellee and her trustee, Lewis, on their own application, obtained authority from the chancery court to sell the land, and although he did not know of this at the time of his purchase, Lewis did have authority to make the sale to him, and to convey titles, and under the circumstances, especially of the appellee's neglect to assert her right when he might have secured himself, he ought to be protected. The appellee responds to this that the sale was not made under the decree of 1846, and before and at the time of the sale, and for some time afterwards, she was residing with her husband in Mississippi, and therefore involuntarily absent from the State; but on the death of her husband, Lampkin, she returned and commenced proceedings at once for the recovery of the land, before any statute of limitations had barred her right to do so.

The proof establishes, that the land in question belonged to Francis Lewis at the time of his death; that under the decree of 1843 it was allotted to the appellee as a part of

her distributive share; that she and her husband, Lampkin, occupied it from that time until 1846, when they removed from the State; and that Hamlin F. Lewis, who was her trustee under the decree of partition, then went into possession, and so continued until, under his sale to Dudley, in 1851, it was transferred to the latter. It is also sufficiently proven that Dudley had no actual notice of the claim of the appellee, and supposed he was obtaining a fee simple title, for which he paid a valuable consideration.

The following questions are presented: 1. Did the decree of 1843 divest the title of the other heirs of Francis Lewis out of this particular portion of his estate, and vest it in the appellee, her children and her trustee? 2. Was it necessary to the validity of this decree that it should have been recorded in accordance with the proviso to the statute (Clay's Dig. p. 354, § 57,) respecting decrees, which vested the right and title to property without a deed of conveyance? 3. Was Dudley a purchaser for valuable consideration without notice? 4. Should the sale to him in 1851 be referred to the authority given to the trustee, Lewis, by the decree of 1846; and if not, what is his position concerning the matter?

It has been twice decided by this court, that the title to the property in controversy became, by the decree of 1843, vested in Lewis in trust for the appellee, to her sole and separate use for life, with remainder to her children. *Witter v. Dudley*, 36 Ala. 135; *Same v. Same*, 42 Ala. 616. There can be no doubt of the correctness of these decisions. The right to an equitable settlement out of her own property, against her husband, his assignee, &c., before reduced to possession, is inherent in the wife, of which the court of chancery has undoubted jurisdiction.—Spence Eq. Jur., vol 2, 482, 492; 2 Story's Eq. Jur. § 1404-1420. Such a settlement having been made, the appellant, whose interest in the matter accrued long afterwards, can not be heard to impeach its validity in this collateral proceeding.

Whether the decree of 1843 was one on which rested the right and title of property or not, its validity does not at all depend on its being recorded. The recording was

Dudley et al. v. Witter pro ami.

designed to give notice as in case of deeds and other conveyances.

A decree is not implied notice to strangers after the case is ended.—Sugd. on Vend. § 1047. The decree of 1843 was not recorded in the county court office. Dudley had no actual notice of the appellee's claim to the property. It is insisted, however, that the requisition upon the trustee to account annually in the matter of the separate estate specifically described in the decree, was a *lis pendens* at the time of Dudley's purchase. *Lis pendens* in a chancery suit begins with the filing of the bill and service of subpoena, and continues until the final orders are taken in the case.—*Centre v. P. and M. Bank*, 22 Ala. 743. The settlements made from time to time by a trustee of his trust can not be said to be the pendency of a suit, especially in a case like this, where none had ever been made.—Sugd. on Vend. 1046.

As there was nothing of record sufficient to charge Dudley with notice of the appellee's rights, was there any thing existing in parol which should have that effect? In *Sterry v. Arden*, 1 Johns. Ch. R. 261, a purchaser for valuable consideration was charged with constructive notice of a voluntary settlement, because before the execution of his deed he had heard that the grantor had made some provision for his daughters out of property in Greenwich street, and there was no evidence that the grantor owned any other property in that street, except the lots included in the settlement. In *Johnson v. Thweatt*, 18 Ala. 741, a purchaser was charged with notice that a deed of trust under which his vendor derived title was fraudulent. A purchaser must be bound to inquire whether, beyond his own declarations, his vendor has any title to the property he is selling. Otherwise it would be in the power of any agent, tenant or mere trespasser to deprive the owner of his property by a sale. To entitle himself to protection the purchaser must have purchased the legal title, and not be a mere purchaser without a semblance of title.—2 Story's Eq. Jur. § 1502.

It is proven that Dudley knew this land belonged to

Francis Lewis at his death, and that there were several heirs of his estate. He might have supposed that it belonged to Hamlin F. Lewis, as he was in possession of it and was one of the heirs, and it was about the proportion which one would have been entitled to. But he certainly knew that if this was the case, there must be some agreement between the heirs, or some decree of the probate or chancery court to that effect. It was not in evidence that Lewis' claim to this land as his own was open and notorious. The character of his possession must therefore be referred to the capacity in which alone he had a right to claim it. If in that capacity he had authority to sell it, apparent on his title, Dudley may claim the benefit of it; but he must be charged with notice that Lewis held as the trustee of the appellee.

It is unnecessary to determine whether the decree of 1846 for a sale conferred a power on the trustee, as such, or only as an officer of the court. It is sufficient that the intention was manifest, from the application, the terms prescribed, and the duties imposed on both the trustee and the register, that the power of sale was to be exercised within a reasonable time, and was not a continuing power, attached to the trust, and capable of exercise at any time during the existence of the trust estate.

The sale to Dudley was certainly not made in execution of the power and in pursuance of the decree. His deed and his own testimony forbid the assumption. Nor can it be referred to that authority after the lapse of five years therefrom, especially without positive proof that it was so intended by both the trustee and the *cestui que trust*.—*Price v. Meth. An. Conf.* 42 Ala. 39–50.

There is no evidence that the appellee ever concurred in or sanctioned the sale, or received any part of the proceeds.

It results, from what has been said, that Dudley bought no title whatever from Lewis, either legal or equitable, because the latter, at the time, had no authority to sell.

Shall Dudley be held to have been a trustee for the appellee, and liable to account to her for the rents and profits

Dudley et al. v. Witter pro ami.

of the property from the time he obtained possession of it? Is it an imperative rule that he must be regarded either as a *bona fide* purchaser without notice, or as a trustee *in invitum*. The pervading excellence of equity jurisprudence is, that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case. 1 Story's Eq. Jur. § 439.

The test applied by vice-chancellor Wigram in the case of *Jones v. Smith*, 1 Hare, 43, to distinguish the cases in which a purchaser should or not be charged with notice, seems to present a safe rule for determining when a purchaser charged with constructive notice only of a trust, should be treated as a trustee *in invitum*. When the party has incautiously neglected to make inquiries, or has not designedly abstained from such inquiries for the purpose of avoiding knowledge—a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of the facts which the *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and willful blindness, is all that can be imputed to the purchaser, then he should not be charged as a trustee *in invitum*. If we add to this the neglect of the appellee for several years to look after her interest, we think in good conscience the rule of law should be applied to this really equitable action of ejectment.—Rev. Code, § 2617; *Ormond v. Martin*, 36 Ala. 598.

The terms imposed for the continuance granted to the defendant are unusual. This is a matter of discretion, and not reviewable within the purview of the law conferring the power. But a distinction should be drawn between the imposition of terms, and the requisition of conditions amounting to an improper and unjust abuse of the discretion. This latter the superior court ought to remedy on appeal.—*M. & W. P. R. R. Co. v. Persse, Taylor & Co.*, 25 Ala. 536; *S. & N. Ala. R. R. Co. v. Falkner*, 44 Ala. 654.

In this case, however, the terms were accepted, without objection, by the defendant, and may have been proposed by him.

The other assignments of error need not be considered. The case must be sent back, that the account may be taken, in conformity with this opinion.

The decree is reversed, and the cause remanded.

[NOTE BY REPORTER.—At a subsequent day of the term, appellee applied for a modification of the opinion, so as to charge appellant with the rents from the time he had actual notice, &c. The following response was made by—]

B. F. SAFFOLD, J.—The appellee asks that the opinion in this case be modified so as to charge the appellant with the rents and profits of the lands from the time he had actual notice of her rights.

To do this, would be to depart from the principle on which the appellant was held not to be a trustee *in invitum*. The purchase of property, or payment for it, after notice of another's right, is culpable, and renders the purchaser liable as a trustee for the real owner. But notice after payment should not have such effect. The act from which the ill consequences to him are to flow, is past.

The application is denied.

NOTE.—This case was decided at the January term, 1870, and then held under advisement on application for modification of opinion by appellee, and for re-hearing by the appellant, until June term, 1870. The record did not come into Reporter's hands in time to appear in either of the preceding volumes.

ESLAVA vs. DILLIHUNT.

[ACTION UNDER CODE FOR RECOVERY OF PERSONAL PROPERTY IN SPECIE.]

1. *Action for recovery of personal property in specie; when failure of jury to assess value of articles separately will not invalidate judgment.*—In an action under chapter 5, of Revised Code, page 250, for the recovery of personal property in specie, if the property has been delivered to the plaintiff by the sheriff, and consists of many articles of household furniture, and a large number of the articles are of inconsiderable value, and the jury on the trial find for the defendant and assess the value of the articles in gross, and the plaintiff makes no objection to the verdict, because of the failure to assess the articles separately, he will be held to have acquiesced in the verdict and will not be heard to complain of the irregularity for the first time in this court.
2. *Same; what presumption will be entertained to uphold verdict.*—In such a case, unless the contrary appears, it should be presumed in favor of the verdict, that the parties introduced no evidence on the trial, as to the separate value of said articles, and consequently under section 2595 of the Revised Code, it was lawful for the jury to assess the value of said articles in gross, as without such evidence it was impracticable to assess the value of each article separately.

APPEAL from Circuit Court of Mobile.

Tried before Hon. JOHN ELLIOTT.

This was an action for the recovery of personal property in specie under the Code, commenced by the appellant, Eslava, against the appellee. The plaintiff having given bond as required by section 2593 of the Code, the sheriff took the goods into his possession, and the defendant having failed to give the bond required by law to have the articles returned to him, they were delivered to the plaintiff on giving the bond required by section 2594 of the Revised Code.

There was an appearance by both parties, a trial by jury and a verdict for the defendant, which after enumerating the articles sued for, assesses their value in gross at the sum of \$330.45, and judgment was rendered accordingly. The articles sued for were household articles, such as bottles,

Eslava v. Dillihunt.

glass-ware, plated-ware, chairs, &c., in all 92 in number, and most of them such as commonly are of inconsiderable value. After this the record recites that the plaintiff moved for a new trial, which was overruled. The grounds of the motion are not shown.

The plaintiff now appeals, upon the record, there being no bill of exceptions, and assigns for error—

1st. The judgment of the court upon the verdict of the jury.

2d. Rendering judgment upon a verdict, which assessed the value of the articles in gross.

ALEXANDER MCKINSTRY, for appellant.
(No brief came into Reporter's hands.)

C. W. RAPIER, *contra*.—Is there, then, any reversible error in the record? In cases of this kind, it is provided by statute, that the jury must, if practicable, assess the value of each article separately.—Rev. Code, § 2595.

If it be impracticable, then the want of such assessment cannot be reversible error. It is not shown by the record in this case that such an assessment was altogether practicable—many of the articles were of like kind and of small value. Nor does it appear that the jury had any evidence before them respecting the separate value of the articles sued for. If they had none, then it was impracticable for them to assess the value of each. The parties to the suit may have agreed upon the aggregate value, and have agreed to relieve the jury from the task of finding the value of each article.

Now it has been held by this court, that "error will not be presumed, but must be affirmatively shown;" that this court will indulge all reasonable presumptions which the record will allow in support of the proceedings in the court below.—30 Ala. 242; 31 Ala. 101; 37 Ala. 662; 42 Ala. 234; 43 Ala. 544; 14 Ala. 185.

But if the intendments and presumptions of law are insufficient to cure the omission, then it is submitted that by applying the reason of the statute to the circumstances of

the case, and the relations of the parties, it will appear that there is no good cause for a reversal of the judgment, nor just ground of complaint on the part of the appellant.

The provision of the statute directing an assessment of the value of each article, was not designed to favor the unsuccessful party in detinue. The unsuccessful party is in law a wrong-doer. He withholds property which rightfully belongs to another. If this clause was at all intended to operate in behalf of the unsuccessful party, its sole design could only have been to protect him from the hard remedies of distringas and attachment in cases where it would be out of his power to restore the property.

In a case reported in Viner's Abridgment, p. 40, tit. Detinue, sec. 13, it was agreed that the plaintiff, upon offer of the defendant of part of the stuff, is not bound to receive it, but may refuse it, if he does not offer all, and then he shall have all the damages; but if he has received any part of the stuff, he has foreclosed himself of all the damages; and, therefore, because the jury gave entire damages, it was held that the plaintiff was entitled to judgment.

But it may be regarded as settled by the decisions of this court, that the purpose of the statute was to protect the unsuccessful party from the operation of distringas or attachment.—*Bel v. Pharr et al.* 7 A. K. 872; *Miller v. Jones' Adm'r*, 29 Ala. 186.

If such was the purpose of the statute, then in the present position of this case, there should be no reversal, because the successful party is now here asking for affirmance. This is an election on the part of the appellee to take the value of the property and to let the property itself go. Affirmance here would preclude distringas or attachment. 29 Ala. 186.

Surely there should be no reversal, for the purpose only of enabling the wrong-doer to deliver all of the property, or to detain a part and deliver a part, at her option.

But to avoid all difficulty in this respect, the appellee now waives any right which she may now have, or might hereafter have to distringas or attachment for any part or article of the property sued for.

This being done, what good could possibly arise from a reversal of the case? If the appellant wants to have a valuation of each article, so that she may retain some and return others, that is a privilege which she is not in a position to claim as a matter of right. If she wants a valuation that she may be protected from the operation of distringas or attachment, then her fears are unfounded, since the action of the appellee in this court precludes her from a resort to either of those writs.

If the appellant objects that the judgment should not have been rendered upon the verdict, the objection comes too late. A motion in arrest of judgment should have been first made in the court below. There was a motion in the court below; but it was not for the arrest of judgment, but for a new trial.

PECK, C. J.—The action in this case was for the recovery of personal property in specie, under chapter 5, Revised Code, p. 520.

The appellant, the plaintiff in the court below, gave the bond named in § 2593 of said Code, and the sheriff was required to take the property into his possession, unless the defendant should give bond, payable to the plaintiff, with sufficient surety, in double the amount of the value of the property, with condition that if he was cast in the suit he would, within thirty days thereafter, deliver the property to the plaintiff and pay all costs and damages which might accrue from the detention thereof.

The defendant having neglected, for five days, to give such bond, the property was delivered to the plaintiff, on his giving the bond mentioned in § 2595 of said Code, payable to the defendant, with condition to deliver the property to the defendant, within thirty days, in case he should fail in the suit, &c.

The property sued for consisted of some ninety-two articles of household furniture, valued at \$330, a very large majority of said articles being of inconsiderable value.

Section 2595 of said Code is in the following words, to-wit: "Upon the trial of any cause for the recovery of

Eslava v. Dillihunt.

property in specie, the jury must, if they find for the plaintiff, *if practicable*, assess the value of each article of the property separately, and also assess damages for its detention; if they find for the defendant, they must, in like manner, assess its value; and, if in the possession of the plaintiff, assess the damages for its detention. Judgment for either party must be for the property sued for, *or its alternate value*, with damages for its detention to the time of trial."

On the trial the jury found for the defendant, and assessed the value of said articles in gross, at \$330.45.

Neither the plaintiff or defendant objected to said verdict, nor when the said verdict was returned did either party make any motion to have the jury instructed or required to find the value of said articles separately, and judgment, without objection, was rendered for the defendant, that he recover said articles or their alternate value, &c.

The plaintiff has appealed to this court, and seeks to reverse said judgment, because the value of said articles was not separately assessed by the jury.

We think the judgment should be affirmed, for two reasons :

1st. Neither party having taken any exception to said verdict when rendered, but quietly acquiescing in the same, should be held to have waived, as they might lawfully do, the right to have the separate value of each article assessed by the jury.

Requiring the separate value of each article to be assessed in such cases, is intended mainly for the benefit of the losing party, and if he does not object to an assessment of the value of the articles in gross, he should be held to acquiesce in such assessment, and not be permitted to complain for the first time in this court.

2d. Where it does not appear to the contrary, it should be presumed, in favor of the proceedings in the court below, that no evidence of the separate value of the articles was made on the trial, and, consequently, it was impracticable for the jury to find a separate value for each article, and, therefore, correctly assessed a gross value, as they

might lawfully do ; for the statute says the jury must, *if practicable*, assess the value of each article separately. If a separate value was not proved, then it was not practicable for the jury to assess a separate value, and a general verdict was sufficient.

For these reasons, we affirm the judgment of the court below, at appellant's cost.

FLANAGAN vs. THE STATE.

[INDICTMENT FOR MURDER.]

1. *Service of copy of indictment and list of jurors ; when omission of record to show, is reversible error.*—The omission of the record to show service of a copy of the indictment and a list of the jurors summoned for his trial, upon the defendant, as required by law, when he is in actual confinement, is a reversible error.
2. *Indictment for murder, trial of ; what evidence admissible on.*—Any fact which tends to show the real motive of the accused in killing the deceased is relevant evidence, whether offered in prosecution or defense.
3. *Charge to jury ; what erroneous.*—Charges which present the erroneous and unreasonable belief of the accused, respecting certain alleged provocation of the deceased, and the accused's transport of rage in consequence, as reasons why he should be acquitted, without any defense or evidence of insanity, are properly refused.
4. *Provocation to reduce voluntary homicide to manslaughter ; what should be nature of.*—The provocation which should have the effect to reduce voluntary homicide to the grade of manslaughter must be so apparent as to justify the assumption of its reality. It must also be sudden and sufficiently great, and calculated to exasperate, both in its character and in respect to the person against whom it is directed.
5. *Malice ; province of jury to ascertain existence and degree of.*—Malice being the test and gauge of the character of voluntary homicide, it is the province of the jury to ascertain its existence and degree.

APPEAL from the City Court of Mobile.

Tried before Hon. C. F. MOULTON.

The facts are sufficiently stated in the opinion.

ALEXANDER McKINSTRY, for appellant.

JOHN W. A. SANFORD, Attorney General, *contra*.

B. F. SAFFOLD, J.—The appeal is taken from a conviction of murder in the second degree. No service of a copy of the indictment, and a list of jurors summoned for his trial, is apparent on the record, he being in actual confinement. This omission is a reversible error.—*Robertson v. The State*, 43 Ala. 325.

Other questions of importance are presented, which require decision. A homicide perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing, is murder in the first degree.—Rev. Code, 3653. Every other homicide where the person slain was the primary and direct object of the offense, committed under such circumstances as would have constituted murder at common law, is murder in the second degree.—*Ib*.

The evidence establishes, that Flanagan, the accused, between half-past seven and nine o'clock in the evening, came up to a grocery house or store, where several persons were assembled, wearing a slouched hat and overcoat, so as to conceal his features. He asked if any one had passed. In a few minutes it was said that some one was approaching on horseback. The accused arose from his seat and walked into the middle of the road. As the horseman came up, he peered into his face, evidently to see who he was, and then commenced firing on him with a pistol. Four shots were fired, and the rider, who was John Edwin Banta, was killed. Flanagan was immediately arrested by policemen who were present at the grocery store, and one of them, recognizing him, said: "Is that you, Jim? I wish I had known you sooner." To which the prisoner replied: "Yes, if you had, I wouldn't have done what I wanted to do." The hat of the deceased was picked up, and at his request, was shown to him. He examined it and said: "It's right; I have got him." The body of the deceased had been borne some distance away by his horse.

This brief story, with some other declarations of the prisoner, indicative of a determined purpose to kill the deceased, was all the evidence submitted to the jury.

The first inquiry, on hearing of such a deed of violence, would naturally be, what was the motive of the perpetrator? There was a motive, and it was offered as evidence in behalf of the accused, but was excluded by the court. This is the chief error assigned on the merits of the case.

The accused was manifestly lying in wait, or watching for an opportunity to make an attack, with the intention of killing the deceased. This the statute designates as a willful, deliberate, malicious and premeditated killing, and declares it to be murder in the first degree, punishable by death or imprisonment in the penitentiary for life. The only escape from this fate was in the inducement to the killing, and when that was made known to the court, it was excluded from the jury, and perhaps correctly, if we abide by the weight of judicial precedents. He had not struck in defense of himself, or of those relatives whom the law recognizes his right to protect. In fact, the deceased had not done anything which the law of Alabama regards as a crime, whether a felony or misdemeanor. He had only defiled the young sister of the defendant, under the promise and pretense of marriage, and had written to her that he would not marry any woman whom he had seduced. This was communicated to the brother only a few hours or less before the killing. He had been summoned from Selma to attend his sister's wedding, and it was this that he witnessed instead of her marriage.

Section 3598 of the Revised Code forbids a man and a woman to live together in adultery and fornication, under pain of a fine, not less than one hundred dollars, and imprisonment not exceeding six months. This young girl must become her betrayer's leman and share his punishment with him, or else he has committed no offense. Her father may sue him for the loss of her services and recover a trifle, but if he has no property, the suit will be vain. Under such protection of law, the wonder is not that

woman's chastity is esteemed of more value than her seducer's life.

The court charged the jury that they must either find the defendant guilty of murder in the first degree or acquit him entirely. This they would not do, but after nearly or quite twenty-four hours deliberation, on their request, they were further instructed that they might find him guilty of murder in the second degree. The court refused to instruct them, on the request of the defendant's counsel, in reference to the lower grades of homicide.

Manslaughter is not defined by our statutes, but is taken with its common law definition. This is the unlawful killing of another without malice, either expressed or implied; which may be either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act. Black. Com. p. 191. Our statute divides this into two degrees, the first punishable by imprisonment for not less than one year nor more than ten years, the second, by imprisonment for not more than one year, to which may be added a fine not exceeding five hundred dollars.—Revised Code, § 3660.

As the malice, or evil design, with which the killing is perpetrated is the distinguishing criterion, and as this must be determined by the circumstances of each case, it has been left to judicial decisions to draw the line of separation. In some instances where precedents have been more closely followed by the courts than suited the public sentiment, the legislature has intervened to declare the law in specified cases. For example, in cases of prosecution for assault and battery, or affray, opprobrious words, or abusive language, used by the person assaulted or beaten, at or near the time of the assault or affray, may be given in evidence in extenuation or even justification, as the jury may determine.—Rev. Code, § 4198. But the words or language which may justify a serious breach of the peace do not subject the party using them to a prosecution, unless they are also slanderous.

The killing of another on the moment for offenses to the person of the slayer, has been regarded by all judi-

cial authority as extenuating the homicide to the grade of manslaughter, out of regard to human frailty. Pulling one's nose is an offense adjudged to have that effect. There are, however, some outrages more exasperating than this, towards which the law is not so lenient, and for which it provides no adequate redress. The resenting these, as Blackstone says of duelling, no penalties of the law will ever be effectual to suppress till a method be found of compelling the original transgressor to make some other satisfaction to the affronted party which the world shall esteem adequate, and reputable to be resorted to.

In *Noles v. The State*, 26 Ala. 31, it was held that any fact which tends to prove the real motive of the accused in killing the deceased, is relevant evidence. When the perpetrator is unknown and must be discovered by circumstantial evidence alone, such facts would be seized on with avidity in aid of the prosecution. Why not in defense to it? The motive or inducement to an act must be either an extenuation or aggravation of it. The evidence offered in behalf of the defendant to show the reason of his conduct, ought to have been admitted.

All of the charges asked by the defendant were properly refused as involving the same error. Without any defense of insanity, or evidence tending to prove it, they present the erroneous and unreasonable belief of the accused, and his transport of rage on account of his own error, in that respect, as sufficient reasons for his acquittal. The law does not accord impunity to unbridled passions, nor suffer an individual to dispose of the life of his fellow being on his own judgment and belief. It cannot consent that the voluntary killing of another by a person of sound memory and discretion shall be excusable, except in cases of real defense of life, or against great bodily harm. When the danger apprehended is not real, its appearance must be reasonable and imminent. So in reference to the provocation which should have the effect of reducing the killing to the grade of manslaughter. It should be real, or so apparent as to justify the assumption of its reality. It also should be sudden and sufficiently great. It should be

Wright, Adm'r, v. Swanson.

calculated to exasperate both in its character, and in respect to the person against whom it is directed.

Malice being the test and gauge of the character of the voluntary homicide, it will always be within the province of the jury to ascertain its existence and degree. In arriving at a conclusion they should be governed by an enlightened sense of justice, and their practical experience of the springs of human action.

The judgment is reversed and the cause remanded.

WRIGHT, ADM'R, vs. SWANSON.

[CONTEST OF ANSWER OF GARNISHEE.]

1. *Garnishee, answer of; what plaintiff may require when unsatisfactory.*
When the answer of a garnishee is not satisfactory to the plaintiff, he is entitled to examine him orally in the presence of the court, or he may make affidavit that he believes the answer to be untrue, and have an issue made up for trial.
2. *Same; when garnishee can not object to irregular mode of contest.*—If the plaintiff obtain leave of the court to file interrogatories, and the cause is continued under agreement to give time to the garnishee to answer, he can not at the next term object to the manner of his examination.
3. *Same.*—In such a case, if the answer to the interrogatories is insufficient, the plaintiff ought to be allowed an oral examination.

APPEAL from the Circuit Court of Macon.
Tried before Hon. LITTLEBERRY STRANGE.

COCKE, who died during the pendency of the appeal, which was revived in the name of his administrator, commenced suit by attachment against one Griggs, and had Swanson, the appellee, summoned to appear at the fall term, 1868, of the circuit court, to answer as garnishee, &c.; at that term the garnishee did not appear, and the

case was continued. At the next term the garnishee appeared and filed an answer, and the plaintiff, by leave of court, filed written interrogatories to the garnishee, without objection. The garnishee not being able to answer these interrogatories during the term, it was agreed between the parties that the garnishee should have until the next term to file his answer. At the next term the garnishee filed his answer to the interrogatories, and seven days thereafter plaintiff filed written exceptions to the answer, and thereupon the garnishee moved the court to set aside and annul the order giving leave to file written interrogatories to him, and to discharge him upon his first answer, no affidavit having been filed at that term to contest his answer. The court granted this motion, and discharged the garnishee, and appellant excepted to this ruling, and moved for leave then to examine the garnishee orally. But the court overruled this motion, and appellant excepted.

The rulings of the court to which exceptions were reserved are now assigned as error.

WATTS & TROY, and McIVER, for appellant.—The fact that the plaintiff may have the garnishee examined orally in the presence of the court, necessarily implies that the interrogatories in writing may be filed by the plaintiff. The presumption is, that the examination of the garnishee is in writing, and the privilege is given by this section of the Code to have the examination oral, in the presence of the court, if the plaintiff desires it.—See *Easton v. Lowery*, 29 Ala. 454.

But if it was irregular for the court to allow written interrogatories to be filed, the garnishee has waived any such irregularity by answering the written interrogatories so filed, without objection. He waived the irregularity, unless he objected at the time the order was made allowing them, and at the filing thereof. The answer without objection is an admission of the right of the court to permit them to be filed, and waives, necessarily, any objection to

Wright, Adm'r, v. Swanson.

filing them.—3 Ala. 43; 9 Ala. 400; 26 Ala. 582; 33 Ala. 512; 16 Ala. 325; 36 Ala. 570; 26 Ala. 670.

So long as the garnishee continued before the court, and was undischarged on his answer, he was under the control of the court, and could be compelled to answer orally, if the plaintiff chose to have him examined orally. He was not only legally present in court, but was actually present, when plaintiff made a motion to have him answer orally.

The section of the Code giving this right to the plaintiff is not confined to the term at which an answer is filed, but continues so long as the garnishee continues before the court to receive its judgment.

DAVID CLOPTON, *contra*.—Where a special authority, in derogation of the common law, is conferred by statute on a court of general jurisdiction, it becomes, *quoad hoc*, an inferior or limited court. A compliance with the requisitions of the statute is necessary to its jurisdiction, and must appear on the face of its proceedings.—*Gunn v. Howell*, 27 Ala. 663. In this case, it is also held that process of garnishment is such special authority.—*Stevenson v. O'Hara*, 27 Ala. 362; *Matthews, Finley & Co. v. Sands & Co.*, 29 Ala. 136.

These cases settle, that processes by attachment and garnishment were unknown to the common law, are special statutory remedies, and can only be issued by the persons, in the manner, and under the circumstances prescribed by statute.

As in processes by attachment and garnishment the circuit court is an inferior or limited court, it can exercise only such powers and adopt such proceedings as are authorized by statute.—*Martin's Heirs v. Martin*, 22 Ala. 86; *Thrasher et al. v. Pinckard's Heirs*, 23 Ala. 616.

Before the adoption of the Code of 1853, a plaintiff was authorized to file interrogatories to a garnishee, and the court was not authorized to receive an oral answer except on consent of all the parties concerned.—Clay's Dig. p. 63, § 44.

By the Code of 1853, section 2450, and which is the

same in the Revised Code as section 2968, a change was made ; authority to file interrogatories was omitted, and it was provided that the garnishee " may, if required by the plaintiff, be examined orally in the presence of the court."

By this change of the statute, the legislature could have intended nothing else but to take away from the court the authority to allow interrogatories to be filed, and to substitute in lieu thereof an oral examination.

Since the adoption of the Code of 1853, and under the Revised Code, a garnishee can be required to answer in two ways, viz.: one by a written answer according to the terms of the citation, and the other, orally, in the presence of the court ; and any order of the court requiring an answer in any other mode is beyond the jurisdiction of the court, and void.

The power to file interrogatories in writing cannot be implied from the power to require an oral examination. A power ought to be clearly inferred, and not deduced from vague surmises as to the intention of the legislature.—*Stevenson v. O'Hara*, 27 Ala. 262. It would be violent inference, when the legislature repealed the law authorizing interrogatories, or to say that an oral examination in the presence of the court may be upon written questions, or be answered out of court.

The garnishee is not estopped from denying the validity of the order by any of the subsequent proceedings.

At the December term, 1868, the garnishee answered according to the terms of the citation. The plaintiff then did not propose to contest the answer, or require time, or require an oral examination in the presence of the court, and no order whatever, except the entry on the judge's docket, of leave to file interrogatories. At the next term of the court, the garnishee filed answers to the interrogatories, and when the case was called, moved the court to vacate and set aside the order of leave to file interrogatories.

Consent cannot give jurisdiction of the subject-matter, which, in this case, was the filing of interrogatories to a garnishee, or in a matter which the law excludes.—*Winn v. Freeda*, 19 Ala. 171. The law or statute providing a cer-

Wright, Adm'r, v. Swanson.

tain mode of examination excludes all others upon the maxim, "*expressio unius, alterius exclusio.*" Hence, examination by interrogatories is a matter excluded by law, and can not give jurisdiction.—*Burford v. Daniels*, 20 Ala. 445; *Harrison & Saunders v. Harrison*, 20 Ala. 629; *Jeffries v. Harbin*, 20 Ala. 387; *Fields v. Walker*, 23 Ala. 155; *Little v. Fitts*, 33 Ala. 343; *Johnston v. Fort*, 30 Ala. 78.

Filing answers to the interrogatories is *quasi* pleading, and impleading can not confer jurisdiction.—*Crabtree v. Cliett*, 184; *Howard v. Ingersoll*, 23 Ala. 673.

All the cases cited by the attorneys for the appellant are cases in which the consent gave jurisdiction of the person, or was a waiver of irregularities.

The court has power to set aside a void order at any time, and it is its duty to do so on application being made. *Johnson v. Johnson's adm'r*, 40 Ala. 247.

No proceedings under a void order can operate as an estoppel, unless in a case where appearance or consent gives jurisdiction of the person alone. Estoppels must be mutual.

An affidavit for a contest must be made at the term of the court during which the answer is filed or further time obtained.—Rev. Code, § 2974; *Graves v. Cooper*, 8 Ala. 811.

If the plaintiff desires an oral examination, he must do so at least by the time the garnishee answers. Again, an oral examination is in the discretion of the court; the word used in the statute is "*may*," and its refusal is not revisable.

It does not appear that the garnishee was present when the order to file interrogatories was made; it was *ex parte*, and if he had been present, it was not necessary to object to a void order.

B. F. SAFFOLD, J.—The answer of the garnishee, Swanson, not being satisfactory to the plaintiff, the court, by order, suffered him to file written interrogatories to the garnishee. The matter was then continued, by agreement of the parties, without objection. At the next term, the

garnishee filed an answer to the interrogatories, but moved the court to set aside the order allowing them. He had not before objected to them, but, on his request, had obtained time to answer. His motion was granted, and he was discharged on his former answer. The plaintiff objected to the discharge, and insisted on examining him orally. This the court refused to permit. The plaintiff had not previously proposed an oral examination, nor had he offered to contest the answer otherwise than by obtaining leave to file the interrogatories. The appeal is from the judgment discharging the garnishee, and the above stated rulings.

The manner of contest pursued by the plaintiff was according to the practice under Clay's Dig., p. 63, § 44. The Revised Code (§ 2968-2540) prescribes a different mode. If the plaintiff is dissatisfied with the written answer, he is entitled to examine the garnishee orally. Or he may make oath that he believes the answer untrue, and have an issue made up under the direction of the court, to be tried by a jury, if desired by either party.—Rev. Code, § 2974. This latter proceeding is required to be commenced at the term the answer is filed.

The oral examination is not limited by the statute to the term when the answer is filed, though it would seem that unless some motion for that purpose was made during the term, it ought to be regarded as a waiver of the right. It was, however, entirely competent for the parties to agree that the examination should be upon the interrogatories, and that it should be continued to the next term. Was not this virtually done in this case? The plaintiff proposed to examine the garnishee in writing, and the latter agreed with him to postpone the matter until the next court, in order that he might answer in the same manner. It was the right of either party to have the examination reduced to writing by exception, for the purpose of appeal. *Eastern v. Lowery*, 29 Ala. 454.

We regard the second answer of the garnishee as made under agreement. If the court should consider it not suf-

Cockran v. The State.

ficiently responsive to the interrogatories, the plaintiff ought to be allowed to examine him orally.

The judgment is reversed and the cause remanded.

COCKRAN *vs.* THE STATE.

[INDICTMENT FOR ENTICING APPRENTICE.]

1. *Transcript, authentication of; when sufficient.*—A transcript of the judicial proceedings of a court of record in this State is sufficiently authenticated to be admissible in evidence in any other court of the State when certified by the proper officer under the seal of the court.
2. *Minor, order of probate court apprenticing; when valid.*—An order of the probate court apprenticing a minor on the application of his mother, because she is unable to support him, is not void on the ground that the application was made by the mother, it not appearing that he had any father; nor because no notice was given to the minor and no guardian *ad litem* appointed to represent him.
3. *Apprenticeship; what act does not avoid.*—The mere abandonment of service by the apprentice does not avoid the apprenticeship; nor can the master release himself from his obligation without leave of the court.

APPEAL from Circuit Court of Pike.

Tried before Hon. J. McCaleb Wiley.

THE appellant was indicted and convicted under section 3690 of the Revised Code for enticing away a minor. It appears that in 1865 Wade Hampton Turner, a minor, eleven years of age, was, upon the application of his mother, apprenticed by the probate court to A. J. Lane. The proof offered of this, was an exemplified copy of the proceedings from the records of that court, under its seal. The appellant objected to the admission of this record, upon grounds fully stated in the opinion, but his objection was overruled. The apprentice remained with Lane, with slight intervals of time, from the time he was apprenticed until a night in

the spring of 1871, when he left Lane's home without his knowledge. The next morning the apprentice was found upon appellant's premises, who was then notified that he had hired an apprentice, and was requested to return the apprentice to Lane; this he refused, saying he had hired the boy from his mother, as he had a right to do.

There was evidence that in 1869 Lane had returned the apprentice to his mother, refusing to keep him longer; but Lane afterwards received the apprentice again, and had him in his employment when the apprentice left to go to appellant.

The court refused, at the request of the defendant, to charge the jury, that if Lane had ever discharged the minor from his employment, legally or illegally, they could not convict defendant if they believed that he hired the apprentice afterwards.

This charge the court refused, and defendant excepted.

B. F. SAFFOLD, J.—The appellant was convicted on an indictment for enticing away an apprentice, under section 3690 of the Revised Code.

At the trial, he objected to the introduction of evidence of a writing certified by the probate judge of Barbour county, to be a correct copy from the records in that office, to which transcript and certificate was affixed the seal of the probate court of Barbour county, with a one dollar State stamp attached and cancelled by the probate judge of said court. This transcript recited a petition by Jane Turner, a freed woman, residing in Barbour county, Alabama, to have apprenticed her five children, from eleven years to six months old, including Wade Hampton Turner, the one alleged to have been enticed away, on the ground that she was unable to support them. This petition was subscribed by Jane Turner, with her mark, and by Shorter and Seals as her attorneys. It was sworn to before the probate judge. The transcript also contained the order of the court that letters of apprenticeship issue to Alexander Lane.

The grounds of the objection to this writing as evidence

are—1st. That the alleged transcript is not properly authenticated. 2d. It is void as an order or judgment of the probate court, because rendered on the application of the mother of the children only, and without notice to the children, or representation of them by a guardian or other person.

The usual manner of proving a record in this State is by an exemplified copy under the seal of the court in which it is. Our courts are required by act of Congress to receive in evidence the records and judicial proceedings of the other States of the Union when so authenticated, the attestation being certified by the proper magistrate to be in due form. The seals of courts instituted for the public administration of justice prove themselves.—2 Phil. Ev. 343-6. The indenture of apprenticeship was shown to be lost by its proper custodian, and there was no valid objection to proving the fact of the apprenticeship by the certified copy of the record of the court issuing the letters.

Unless the proceeding in the probate court is void, the appellant, being a stranger, had no right to question its regularity.—*Dupree v. Perry*, 18 Ala. 34. The court of probate is authorized to bind out as apprentices the children of any person unable to provide for their support, until the age of twenty-one years.—Revised Code, § 1450. The letters of apprenticeship may be revoked at any time. § 1433. Sheriffs, justices of the peace, and all other civil officers of the several counties, are enjoined to report such cases to the court.—§ 1454. Full proof of the suitableness of the master to have charge and care of the minor is to be made, and a proper bond is to be taken from him for the performance of his duties.—§ 1455. Any parent having a minor child, may apprentice such child as provided for in the statutes respecting the care of the poor.—§ 1462. Provision is made for notifying the father of a minor, or the mother if there is no father, of the proceedings to apprentice the child.—§ 1464. But there is no such requisition of notice to the child, or even of its consent. This is amply provided for in the authority of the court to revoke the letters for good cause at any time. Besides, the assent

of the infant is not necessary in case of paupers.—2 Kent Com. p. 264.

Though all the regulations for apprenticing a minor be not precisely followed, the deed is only voidable by the parties.—13 Johns. 245. Nor does a mere abandonment of service by the apprentice avoid it.—Rev. Code, 1457; 16 East, 13, 27.

As a master may not release himself from the obligation into which he has entered except on good and satisfactory cause shown to the court.—Rev. Code, 1460. So if he has violated his duty in this respect, he may resume its performance again, until he is removed or discharged. We find no error in the record.

The judgment is affirmed.

FISHER vs. THE STATE.

[INDICTMENT FOR GRAND LARCENY.]

1. *Indictment; on what defendant can not be convicted of larceny.*—On an indictment for breaking and entering a dwelling house *with intent to steal*, the defendant cannot be convicted of larceny.
2. *Same; what proceedings do not put defendant in jeopardy.*—If on the trial of the defendant under such an indictment, the jury return a verdict of guilty, for grand larceny, the verdict is a nullity, and no judgment can be entered upon it, and the defendant may be indicted for the larceny, notwithstanding said verdict; and a plea, in the nature of a plea of *autrefois convict*, based on said verdict, to an indictment for the larceny, is bad on demurrer. The defendant was not, in legal contemplation, put in jeopardy by said verdict.
3. *Plea of not guilty; error to proceed to trial without.*—After a demurrer to such a plea is sustained, it is error to proceed with the trial without a plea of not guilty, pleaded by the defendant, or entered for him by the court.
4. *Possession of stolen property, charge to jury as to; what charge should be given.*—If the evidence against the defendant on the trial is, that a watch, charged to have been stolen, was in his possession, shortly after the larceny was committed, it is error on the part of the court to

Fisher v. The State.

refuse to charge the jury, on the defendant's request, "that the mere possession of the watch is not conclusive evidence that he stole it," for which the judgment will be reversed, on appeal.

APPEAL from City Court of Mobile.

Tried before Hon. C. F. MOULTON.

At the February term (1871) of the city court of Mobile, the defendant was indicted for grand larceny, and at the same term was tried, found guilty, and sentenced to the penitentiary for five years. The defendant pleaded a special plea to the indictment, in the nature of *autrefois convict*. This plea alleges, in substance, that at the February term (1871) of the city court of Mobile, [the same term at which this indictment was found, and the trial and conviction had thereon], the following indictment was found against the defendant, which was properly returned into court, &c., to-wit :

"STATE OF ALABAMA, MOBILE COUNTY—*City Court, February Term, 1871* :—The grand jury of said county charge, that before the finding of this indictment, John Wilson, sometimes called Reynolds, sometimes called Kennedy, broke into and entered the dwelling house of Charles Leach, *with intent to steal*, against the peace and dignity of the State of Alabama. M. B. JONA, Solicitor."

The plea further alleges that upon this indictment defendant was put upon trial, on issue joined on plea of not guilty, before a jury of twelve good and lawful men, duly sworn and charged, &c.; that both parties examined witnesses, &c.; that after evidence closed, the presiding judge charged the said jury, among other things : "That if they did not find defendant guilty of burglary, they might lawfully go on and ascertain from the evidence whether the defendant was guilty of grand larceny, and if they should believe from the evidence that defendant was guilty of grand larceny, they might lawfully render a verdict under said indictment" ; and, thereupon, under said charge, as the law of the case, the jury returned a verdict in the following words : "We, the jury, find the defendant guilty of grand larceny, as charged in the indictment, and we

further find that defendant shall be sentenced to hard labor for the county"; that said verdict and sentence is still of force and unreversed; and that the offense of grand larceny, for which defendant was thus convicted, and that with which he now stands charged, are in law and fact the identical offense, and not another or different offense.

The court sustained a demurrer to this plea, and, in doing so, "remarked that it would decline to pass sentence upon the verdict of the jury, rendered on the trial for burglary, inasmuch as the verdict so rendered was a nullity."

The bill of exceptions then states: "After the ruling of the court upon the demurrer to the plea, the cause proceeded to trial."

The evidence shows that early in December, 1870, the house of Leach, the owner of the property stolen, was entered, and a watch worth thirty-five dollars and some clothes worth seventy-five dollars, belonging to him, were stolen.

The evidence also tended to show that early in the same month, the accused, about ten o'clock at night, called one Meader out and offered to sell him the watch for fifteen dollars, but finally sold it for ten dollars. Meader sold the watch to one Pedal, who returned it to the owner; and on the trial the watch was identified as the one sold by the accused, and the property of Leach. There was an attempt on the part of the State to prove a confession, but this need not be further noticed. No evidence was offered on behalf of the prisoner. The bill of exceptions does not purport to set out all the evidence.

After the general charge to the jury, the accused asked the court to charge the jury "that the mere possession of the watch is not conclusive evidence that the defendant stole it." This charge the court refused, and defendant excepted.

The errors assigned are—

1. Sustaining the demurrer to the plea.
2. Refusing the charge asked.

L. H. FAITH, for appellant.

ATTORNEY GENERAL, *contra*.

(No briefs came into Reporter's hands.)

PECK, C. J.—The court below committed no error in sustaining the demurrer to the special plea in the nature of a plea of *autrefois convict*. The former indictment, set out in said plea, was for burglary *merely*, by breaking and entering the dwelling house *with the intent to steal*. Under that indictment, the defendant could be convicted of burglary *only*, but he could not be acquitted of the burglary, and convicted of a larceny, for the plain reason that the indictment did not charge a larceny.

If the indictment had been for burglary, charging a stealing of goods, then there might have been an acquittal for the burglary, and a conviction for the larceny.

The reason for this difference in the two cases is, in the first case, the indictment is for burglary, *with intent to steal, only*,—no larceny is charged; but in the second case, both burglary and larceny are charged. Therefore, the defendant may be acquitted of the burglary and convicted of the larceny.

In such a case, if there is an acquittal of the burglary and conviction of the larceny, it is a good defense against a subsequent prosecution for either offense, and *e converso*.

In Hale's Pleas of the Crown, vol. 2, p. 246, it is said, "If A commit a burglary, and likewise, at the same time, steal goods out of the house, if he be indicted of larceny for the goods, and acquitted, yet he may be indicted for the burglary, notwithstanding the acquittal. And *e converso*, if indicted for the burglary, and acquitted, yet he may be indicted of the larceny, for they are several offenses, though committed at the same time. And burglary may be where there is no larceny, and larceny may be where there is no burglary."

In Russell on Crimes, vol. 1, § 39, note, speaking of these paragraphs in Hale, it is said, an acquittal on burglary, *charging a stealing of goods*, is a good bar to an indictment for stealing the same goods, for, on the indict-

ment for the burglary, he might have been acquitted of the burglary and convicted of the larceny *only*. And although it is said in 2 Hale, 246, that if a man "be indicted for burglary, and acquitted, yet he may be indicted for the larceny, for they are several offenses, though committed at the same time," yet this must be intended of an indictment for burglary *with intent to steal the goods*, as is evident from the words which follow: "And burglary may be where there is no larceny, and larceny may be where there is no burglary."

On the trial of the former indictment, set out in the plea in this case, which charged a breaking and entering of the dwelling house, *with intent to steal, merely*, but not a breaking and entering and a stealing of goods, the court charged the jury that "if they should not find said defendant guilty of the offense of burglary, they might lawfully go on and ascertain from the evidence whether he, said defendant, was guilty of grand larceny; and if they should believe from the evidence that the defendant was guilty of grand larceny, that they might lawfully render a verdict of grand larceny under said indictment." Thereupon the jury returned a verdict in the following words: "We, the jury, find the defendant guilty of grand larceny, as charged in the indictment, and we further find that the defendant shall be sentenced to hard labor for the county."

No objection was made to this verdict, by the State or the defendant, but it was received and recorded by the court, and the said plea avers that it stands unreversed, unrepealed, and not set aside, and not vacated.

This verdict was a mere nullity; it had no indictment to support it. The offense of grand larceny was not included in the indictment for breaking and entering the dwelling house *with the intent to steal, merely*, which is the indictment set out in defendant's plea, and the indictment on the trial of which the said verdict was rendered.

It can hardly require an argument to prove that a verdict in a criminal case that has no indictment to support it, is a mere nullity. In such a case the defendant cannot be said to be put in jeopardy for the offense named in such

verdict, in the sense of that word as used in the books, or as employed in the constitution, any more than when he is put upon his trial on a defective and insufficient indictment. In a loose and incorrect sense, a defendant may be said to be in jeopardy in both cases, as in that sense a party arrested on a criminal charge may be said to be in jeopardy even before indictment found.

The verdict returned as aforesaid, on the trial of the former indictment, being a nullity, the defendant cannot plead it in bar of the trial for the larceny charged in the indictment in this case, although the larceny named in said verdict, and the larceny charged in this case, be averred to be the same.

After said verdict was returned as aforesaid, the court no doubt discovered that the law had been misapprehended in the charge given to the jury, and that said verdict was a nullity; and for that reason, and correctly, refused to render any judgment upon it, and as the record shows no judgment has, in fact, been rendered upon it, and it is very clear no judgment can hereafter be rendered upon it, consequently the defendant has not in any legal sense been put in jeopardy by reason of said void verdict, and so far as we can see he has not been and can not be injured by it.

We therefore hold, that said special plea of *autrefois convict*, discloses no legal defense or bar to the present indictment for the larceny therein charged, and that the demurrer to said plea was correctly sustained.

Hale says, and cites 4 Coke's Rep. 44-45, Vauxe's case, that *autrefois convict* or *autrefois acquit*, by verdict, &c., is no plea in any case, unless judgment be given upon the conviction or acquittal.—2 Hale's Pleas of the Crown, 248.

But we do not rest our opinion upon this rule, but upon what we consider a better reason, to-wit: that the defendant was not put in jeopardy in any legal sense by said void verdict.

2d. After the demurrer was sustained, the State proceeded with the trial of the defendant, without any plea of not guilty, pleaded by him or entered for him by the court.

This was an error for which the conviction, and the judgment and sentence of the court below, must be reversed.

There can be no trial on the merits, in a criminal case, until the defendant has pleaded not guilty, or this plea has been entered for him by the court.—1 Bish. Crim. Proceed. § 468; *Sartorius v. The State*, 24 Miss. 602, and *Slocovitch v. The State*, present term.

3d. The charge asked by the counsel of the accused, “that the mere possession of the watch is not conclusive evidence that he stole it,” we think was improperly refused. Possession by the accused, in a prosecution for larceny, of the articles stolen, soon after the larceny was committed, raises a reasonable presumption of guilt.—*The State v. Otis S. Merrick*, 1 Lead. Crim. Cases, 360. In this case the court say, “evidence of this nature is by no means conclusive, and it is stronger or weaker as the possession is more or less recent.”

As this charge stated the law correctly, on the evidence in this case, the defendant had a right to have the jury so charged.

The judgment and sentence of the court below are reversed, and the cause is remanded for further proceedings, and the defendant will remain in custody until discharged by due course of law.

INDEX.

ACCOUNTS.

1. *Between merchants.*—An account between merchants is closed at the date of the last item, and the balance will draw interest from that date.—*Prestridge v. Patrick Irwin & Co.* 653

ACTION.

1. *Against county, under act of 1868 "to suppress murder," &c.*—The penalty given against a county by the act entitled "an act to suppress murder, lynching, assaults, and assaults and batteries," approved December 28, 1868, is not a claim required to be presented to the court of county commissioners before suit brought, but must be recovered by an action in the circuit court of the proper county, by summons and complaint against the county.—*Dale County v. Gunter.* 118
2. *Same.*—The act having provided a special way by which such penalty is to be recovered and collected, that way, and no other, must be pursued for that purpose.—*S. C.* 118
3. *Same; "outlaw" defined.*—The word "outlaw," as employed in the first section of said act, is not to be understood in the sense of that term as used in the English statutes and common law, but is to be understood as referring to the character of person or persons named in the act entitled "an act for the suppression of secret organizations of men disguising themselves for the purpose of committing crimes and outrages," approved December 26, 1868, and who by said act, while under cover of such disguise, and while in the act of committing, or threatening, or attempting to commit, the offenses therein named, are put out of the protection of the law, and may lawfully be shot or killed by any person.—*S. C.* 118
4. *Same; the words "in disguise," &c., construed.*—A person "in ambush, or concealed in the bushes," is not a person in disguise, within the purview and meaning of the act first above named, and the assassination or murder of a party by a person so ambushed or concealed, does not inflict upon the county the penalty given by the first section of said act, unless said party is so assassinated or murdered "for past or present party affiliation or political opinion." *S. C.* 118
5. *How county may be sued.*—A county is a body corporate in this State, and it may be sued in the same manner that a natural per-

ACTION—CONTINUED.

- son may be sued, by one who has claims against it, if no other provision is made for their payment; and in such a suit, judgment by default may be taken against the county, if the suit is not defended.—*Randolph County v. Hutchins*..... 397
6. *Foreign corporation; when may be sued by summons and complaint.*
A foreign corporation, doing business in this State through a managing agent or employee, may be sued by summons and complaint, served on such agent or employee, upon a cause of action which accrued in the State.—*Western Union Telegraph Co. v. Pleasants*... 641
7. *When action lies against municipal corporation on parol contract.*
A corporation may make a legal contract by parol, unless the statute of incorporation or some by-law of the corporate body forbids it. The corporation of a town or city is not exempt from this rule. And when this is the case, an action of assumpsit lies against such corporation upon an express or an implied promise. *City of Selma v. Mullen*..... 411
8. *When action for borrowed money lies against a corporation.*—A private corporation, authorized to “borrow money, and issue their bonds therefor,” may be sued on the obligation they give for the repayment of borrowed money, whether it be under seal or not. *McCullough v. Talladega Insurance Company*..... 376
9. *When action lies for nuisance.*—An action on the case lies against him who erects a nuisance, and also for its continuance, though he has leased it to another.—*Grady v. Wolsner*..... 381
10. *Money paid by mistake, suit to recover; by whom may be maintained.*
A suit to recover money paid by mistake may be instituted in the name of the party really interested.—*Moody v. Robinson*..... 432
11. *When joint action lies on contract*—A written contract for the construction of a house for a specified sum of money, signed by the parties, with an obligation beneath as surety for the faithful performance of the contract by the builder, signed, “Philip ^{his} O’Donnell,” ^{mark.} and attested by two witnesses, whose names are written on the same page, but midway between those of the principals and the surety, will support a suit for damages for non-performance of the contract against the builder and surety jointly.—*McQuaid v. Powers and O’Donnell*..... 45
12. *Revivor of action.*—Where a plaintiff styles himself guardian of A. B., and declares on a note payable to him, in that character, but the suit is not brought for the use of the ward, the action is his individual suit, and the superadded words, “guardian of A. B.,” will be regarded as mere *descriptio personæ*; and on the death of the plaintiff the suit should be revived in the name of his personal representatives.—*Bradley v. Graves*..... 277
13. *Railroad companies; when liable for stock killed, &c.*—Railroad companies, in this State, are liable for damages for killing or injuring stock by their locomotive and cars, if they fail to comply with the requirements of caution prescribed in the Revised Code, when such compliance is within the power of their engineers or agents.—*Mobile and Ohio Railroad Co. v. Malone*..... 391

ACTION—CONTINUED.

14. *Same; what diligence must be shown to relieve from liability.*—But if these requirements can not be complied with, the company is bound to show that their agents or servants used all the means in their power, under the circumstances, known to skillful engineers, to prevent the injury complained of. When this is shown the company is not liable.—*S. C.* 391
15. *Claim, presentation of; what sufficient.*—Proof that the auditor of the company had frequently acted as depot agent and paid claims for stock killed, there being no proof that there was any depot agent at the place where the claim was presented, shows a sufficient compliance with the Revised Code, requiring claims for stock killed to be presented in writing in sixty days to the president, treasurer, superintendent, or some depot agent of the corporation.
S. C. 391

ADVERSE POSSESSION.

1. *Of wild lands; what constitutes.*—The mere cutting of timber on wild lands is not such actual possession as the law requires to constitute adverse possession, if the lands be suitable for other purposes.—*Rivers v. Thompson* 335

AGENCY.

1. *Authority to sell.*—Authority to an agent to sell goods does not authorize him to pledge them.—*Voss & Co. v. Robertson, Brown & Co.* 483
2. *What authorizes inference of agency*—In an action for the conversion of two bales of cotton, bought by plaintiff of a third person, which a short time before the sale is shown to have belonged to the defendant, a statement by defendant to plaintiff that “the trade was a good one,” and that “he laid no claim to the cotton,” justifies the inference that defendant had either sold the cotton to plaintiff’s vendor, or had authorized him to sell it.—*Darnell v. Griffin*..... 520
3. *Authority to hire horse; how may be proved.*—To recover damages against a corporation for the loss of a horse, caused by the carelessness of its agent who hired it, express authority to the agent to hire the horse need not be proved; it may be implied, where the evidence will warrant it.—*Western Union Telegraph Company v. Pleasants* 641
4. *Letter written “per” another; what purports to be; what evidence renders admissible.*—A letter, containing an acknowledgment of the receipt of money, subscribed with the name of a party, “per” another, purports to be his writing by his agent; and may be received as evidence to charge him, when the person so signing it testifies that he was the clerk of the other in a different department of his business, had written some letters for him, at his request and dictation, and none without it, though he does not remember anything in connection with the particular letter, except that it is in his handwriting.—*Prestridge v. Patrick Irwin & Co.* 653

AMENDMENT

1. *Of indictment ; when not permissible.*—The amendment of an indictment, without the consent of the accused, and against his objections, even in an immaterial particular, is an unsafe practice, and a reversible error.—*Johnson v. The State*..... 212
2. *Same.*—To permit an indictment to be amended, on motion of solicitor, even in an immaterial matter, without the consent of the defendant, and against his objection, is an error for which the judgment will be reversed.—*Gregory v. The State*..... 151
3. *Of judgment.*—In a joint action on a promissory note against three parties, if the summons is executed on two of the defendants, and returned not found as to the third ; and, in that posture of the case, the plaintiff continues the cause as to the defendant not found, and takes a judgment against the other two, (whereby the entire case is discontinued,) the mistake may be corrected before the adjournment of the court ; but after the end of the term, and the final adjournment of the court, the court ceases to have any power to correct the error, and a motion by the plaintiff, at a subsequent term, to set aside the judgment and re-instate the case on the docket, should be denied.—*Curtis v. Gaines*..... 455
4. *Of affidavit for attachment.*—An affidavit that omits to state that the attachment is not sued out for the purpose of vexing or harassing the defendant, is defective in substance, and is not amendable.
Hall & Curry v. Brazelton..... 359

APPRENTICES.

1. *Order of probate court apprenticing ; when valid.*—An order of the probate court apprenticing a minor on the application of his mother, because she is unable to support him, is not void on the ground that the application was made by the mother, it not appearing that he had any father ; nor because no notice was given to the minor and no guardian *ad litem* appointed to represent him.—*Cochran v. The State*..... 714
2. *Apprenticing ; what act does not avoid.*—The mere abandonment of service by the apprentice does not avoid the apprenticeship ; nor can the master release himself from his obligation without leave of the court.—*S. C.*..... 714

ATTACHMENT.

1. *Against national bank.*—The national banks established under the act of the congress of the United States called the "currency act," approved June 3, 1864, may be sued by a creditor of such bank in a State court by attachment.—*Stat. at Large, U. S., 1863, 1864, p. 99.*—*First National Bank of Selma v. Colby*..... 435
2. *Same ; how such suits must be conducted.*—When such suits are so instituted in the courts of this State, they are to be conducted and governed by the laws of this State, applicable to attachment suits against natural persons.—*S. C.*..... 435
3. *Same ; for what cause will not be dissolved, &c.*—Such attachment

ATTACHMENT—CONTINUED.

- will not be dissolved, dismissed or abated, or the levy quashed, because the bank had committed an act of insolvency before the institution of the suit, and its charter had afterwards been dissolved and its franchises forfeited, by decree of the United States district court, and a receiver had been properly appointed to take charge of the assets of said bank, under said act of congress.—*S. C.* 435
4. *Affidavit; sufficiency of.*—An affidavit that omits to state that the attachment is not sued out for the purpose of vexing or harassing the defendant, is defective in substance, and is not amendable.—*Hall & Curry v. Brazelton* 359
5. *For what cause may be abated.*—An attachment sued out on an affidavit defective in matter of substance, may be abated on the plea of the defendant.—*S. C.* 359
6. *Variance; how may be taken advantage of.*—In an action commenced by attachment, a variance between the cause of action stated in the affidavit and attachment, and the cause of action described in the complaint, may be pleaded in abatement.—*Wright and Wife v. Snedecor* 92
7. *Attachment to enforce payment of debt against husband and wife, contracted under section 2376 of the Revised Code.*—Whether or not an attachment can be issued against husband and wife to enforce payment of a debt contracted under section 2376 of the Revised Code, is an open question, which the court will decide when a proper case arises.—*S. C.* 92
8. *When does not lie on account of removal of property out of State.* A shipment of cotton from this State by the usual route, for the honest purposes of trade, by a citizen of this State, who has the means in this State sufficient to pay all debts, will not justify the issuance of an attachment against his estate, on the ground that he "is about to remove his property out of the State, so that the plaintiff will probably lose his debt, or have to sue for it in another State."—*Stewart & Hudson v. Cole & Son* 646
9. *Action on bond; what necessary to defense of.*—A party sued upon the attachment bond, in such a case, for the wrongful or vexatious suing out of the attachment, must be prepared to show in his defense that one of the causes for attachment required by the Code, existed at the issuance of the attachment.—*S. C.* 646
10. *Sale of attached property after judgment.*—Lands levied upon by attachment, after judgment for the plaintiff, may, as well as personal goods so levied on, be sold at the election of the plaintiff, by either a *venditioni exponas* or the ordinary writ of *fiery facias*.—*Autry v. Walters* 476
- See, also, GARNISHMENT.

BAIL.

1. *Undertaking of bail; when not void.*—An undertaking of bail, approved and taken by the sheriff under the order of a chancellor, is not void because the application for bail was not verified; nor be-

BAIL—CONTINUED.

- cause proper notice was not given to the solicitor, and no writ of *habeas corpus*, or precept to the sheriff to produce the body of the prisoner, was issued. These requirements are directory, though they ought not to be omitted.—*Merrill v. The State*..... 82
2. *Same*; plea, what subject to demurrer.—A plea against the rendition of a judgment absolute on a forfeited undertaking of bail, that the accused appeared at the court, and was arrested on a *capias* issued by the clerk after indictment found, without more, is subject to demurrer.—*S. C.*..... 82
3. *Agreement to become bail*; when void.—An agreement by which one party receives a sum of money to become the bail of another accused of felony, in order that a defendant may be released from custody, so as to escape trial, is void, as obstructing or interfering with the administration of public justice. Money paid under such an agreement can not be recovered back.—*Dunkin v. Hodge*..... 523
4. *Judgment final on bail bond*; when cannot be compromised.—A final judgment on an undertaking of bail can not be compromised with the solicitor.—*S. C.*..... 523
5. *Same*; when cannot be assailed collaterally.—Such an undertaking can not be collaterally assailed as void, on the ground that the undertaking was approved by the sheriff, in a case of felony.—(PETERS, J., dissenting.)—*S. C.*..... 523

BAILMENT.

1. *Bailee's liability for interest*.—If one person holds the money of another on deposit to keep until demanded, and on demand and without reasonable excuse refuses to deliver such money, he becomes liable for interest from the time of the demand.—*Ingersoll v. Campbell* 282
2. *Gratuitous bailee of bank-bills*; what acts do not make liable for depreciation, &c.—Where the gratuitous bailee of a naked deposit of bank-bills deposited them with a person of due credit, who made a general deposit of them with a bank of good credit, and when called on to return them delivered the proper sum in bills of the same bank, but not the identical ones received by him, equity will not hold him responsible for the depreciation of the bills on account of the failure of the bank which issued them.—*Henry v. Porter* 294
3. *Same*; degree of care required of.—Of such a bailee is required only that degree of care which every person of common sense, though very absent and inattentive, applies to his own affairs.—*S. C.* 293
4. *Cotton stored in warehouse*; purchaser of, for what storage liable. A purchaser of cotton stored at a warehouse is personally liable for storage accrued during his ownership, though such ownership be unknown to the warehouseman. But he is not liable for storage charges accrued prior to that time, unless there is an agreement to that effect.—*Lehman Brothers v. Skelton*..... 310
5. *Railroad companies are common carriers*.—A railroad company in this State is a common carrier, and whilst the goods are in *transitu*

BAILMENT—CONTINUED.

- it is liable to all the responsibilities of common carriers.—*Mobile and Girard Railroad Co. v. Prewitt*..... 63
6. *Same*; when liability of, as common carrier, ceases.—But where the bill of lading shows that the goods transported were shipped to the owner as consignee, “care of the railroad company,” to be delivered at a station on the railroad, if the goods are transported with the usual expedition, and the owner or his agent is not at the depot designated for the delivery at the time the goods arrive, ready to receive them, the goods may be deposited in the warehouse of the company, and from such deposit the liability of the company as common carrier ceases.—*S. C.*..... 63
7. *Same*; when responsible as warehouseman for hire.—Goods so deposited must be kept by the company under the responsibility of warehousemen for hire, whether actual storage be charged or not, and the company must act without fraud or bad faith.—*S. C.*..... 63
8. *Same*; when charge that carrier is liable only for loss occasioned by gross negligence, is correct.—In a suit for damages for loss of the goods in such a case, if there are two counts in the complaint, the one on a contract of common carriers, and the other on a contract of a warehouseman without hire, a charge asked by the defendant under the latter count, that the company is only responsible for losses and injuries occasioned by gross negligence, is proper, and should be given.—*S. C.*..... 63
- See, also, BILL OF LADING.

BANKRUPTCY.

1. *What liabilities are provable and discharged*.—The liability of the surety of a guardian is a contingent liability provable under section 19 of the bankrupt law of 1867. It is not of a fiduciary character, from which the discharge in bankruptcy of the surety does not release.—*Jones & Cullom v. Knox*..... 53

BANKS.

1. *National banks established by “currency act,” how subject to be sued*. The national banks established under the act of the congress of the United States called the “currency act,” approved June 3, 1864, may be sued by a creditor of such bank in a State court by attachment.—Statutes at Large, U. S., 1863, 1864, p. 99.—*First National Bank of Selma v. Colby*..... 435
2. *Same*; how such suits must be conducted.—When such suits are so instituted in the courts of this State, they are to be conducted and governed by the laws of this State, applicable to attachment suits against natural persons.—*S. C.*..... 435
3. *Same*; attachment against; for what cause will not be dissolved, &c. Such attachment will not be dissolved, dismissed or abated, or the levy quashed, because the bank had committed an act of insolvency before the institution of the suit, and its charter had afterwards been dissolved and its franchises forfeited, by decree of the United

BANK --CONTINUED.

States district court, and a receiver had been properly appointed to take charge of the assets of said bank under said act of congress.

S. C...... 435

4. *Same; charge to jury.*—If the proof on the trial of such a cause shows that the plaintiff had a proper claim against the bank for a certain sum of money deposited with the bank by the plaintiff, and the bank on the trial interposes no plea in defense of the action, it is not error in the court to instruct the jury, that if they believe the proof, they must find for the plaintiff to the amount of the claim he has proved, and interest.—*S. C.*..... 435

BILL OF EXCEPTIONS.

1. *Contents and construction of.*—Where all the evidence is not set out in the bill of exceptions, it will be presumed, in order to sustain the refusal to give a charge, that it was abstract and not supported by the evidence delivered on the trial.—*Ingersoll v. Campbell.*.... 282
2. *Exception, when not noticed.*—An exception which is not intelligible on account of the blanks in it, will not be noticed on a general assignment of errors.—*Vaughan v. Bibb.*..... 153
3. *Same; when not sustained.*—Exceptions not supported by facts set out in the record will not be sustained.—*S. C.*..... 153
4. *Act of February 14, 1870; is constitutional and retroactive.*—A bill of exceptions signed by agreement of the parties on the 8th of June, 1869, before the passage of the "act relating to bills of exceptions," approved February 14, 1870, is made good by that act. This law has a retroactive effect; and it regulates a matter of practice and does not impair vested rights.—*Wharton v. Cunningham.*.. 590

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Bill of exchange; how may be drawn.*—A bill of exchange may be drawn payable to the order of the maker and indorsed by him to a third person; the indorsee may sue the acceptor as if he were the payee.—*Hall v. Shorter & Baker.*..... 453
2. *Same; to whom may be transferred.*—Such a bill of exchange may be transferred by indorsement to an administrator or executor in this State.—*S. C.*..... 453
3. *Same; indorsee may sue in his own name.*—And under our statutes such indorsee may sue thereon in his own name as the owner,—Rev. Code, §§ 1838, 2525.—*S. C.*..... 453
4. *What is a valid promissory note.*—A writing in these words: "One day after date I promise to pay, or at my death, W. G. Conn or bearer, the sum of five hundred dollars for labor done by W. G. Conn for value received, this 11th day of December, 1860. W. R. THORNTON," is a valid promissory note.—*Conn v. Thornton.*..... 587
5. *Promissory note; what prima facie not dischargeable in Confederate currency.*—A promissory note made in this State on 31st October, 1863, for a certain number of "dollars," and payable January 1st, 1864, is not *prima facie* subject to be discharged by a payment in

BILLS OF EXCHANGE AND PROMISSORY NOTES—CONTINUED.

- Confederate treasury notes. In such a note the word dollars means dollars in lawful money of the United States.—*Wilcozen v. Reynolds*..... 529
6. *Same; when will be treated as an obligation to pay lawful dollars of the United States.*—A promissory note given to secure the purchase-money for land, in these words, "Due Nevin McInnish, or bearer, four hundred and eighty dollars, for value received, with interest from date. This Jan. 28, 1865. (Signed,) M. V. B. Taunton," which is sought to be defended in an answer in chancery in the nature of a cross-bill, because the same was alleged to have been made under an agreement to be discharged by a payment in Confederate treasury-notes, will be treated as an obligation to pay the sum mentioned therein in lawful money, if the allegations of the cross-bill in reference to the medium of payment of such note are denied by the answer to such cross-bill, and the same are not supported by proof.—*Taunton & Brooks v. McInnish*..... 619
7. *Same; action by indorsee against maker, what valid defense.*—In a suit by an indorsee against the maker of a promissory note, it is a valid defense that it was given in consideration of the notes and accounts of another person, and payable when they were collected, which had not been done, and that the plaintiff obtained it after maturity.—*Atkins v. Knight*..... 539
8. *Same; fraud of maker and payee, when no defense.*—The fraud of the maker and payee of a note in ante-dating it, for the purpose of practising a deceit on a third person, and making it appear an absolute promise to pay, when, in fact, its payment depended on the success of the deceit, can give no protection to the maker, nor aid to the endorsee after maturity, in a suit for its collection.—*S. C.* 539
9. *Negotiable note; what required of purchaser after maturity.*—It is better to require one who would purchase a negotiable note after its maturity to ascertain whether it is a subsisting demand, than to subject the antecedent parties to the necessity of tracing to him a knowledge that it was not.—*S. C.*..... 539
10. *Note already delivered, signing of as surety; when imposes no obligation on surety.*—The signing of her husband's note, previously made and delivered by him, by a wife, as his surety, does not impose on her any obligation which will sustain its subsequent recognition.—*Hetherington v. Hixon*..... 297
11. *Same.*—Where a widow gave her note, secured by mortgage, for the payment of her deceased husband's debt, at the instance of the promisee, the mere fact that his notes were given up to her is not proof of a valid consideration. It must be shown that obtaining the notes, as something of value, entered into the inducement to her agreement.—*S. C.*..... 297
12. *Same.*—In such a case, loss subsequently sustained on account of a failure to file the notes as claims against his insolvent estate, can not create a consideration, although the non-claim was in consequence of the creditor's belief that he had otherwise secured their payment.—*S. C.*..... 297

BILLS OF EXCHANGE AND PROMISSORY NOTES—CONTINUED.

13. *Note payable to executor ; when title to vests in holder.*—A promissory note payable to executors, transferred by them in payment of a liability of the estate of equal amount, may be sued on by the holder. These facts will protect the maker against any suit instituted by an administrator *de bonis non* or other representative of the estate.—*Moses v. Clark* 229
14. *Validity of consideration of note.*—A promissory note by an iron company, for money or other thing loaned to it, to be used by the company in erecting iron works and making iron for the late Confederate government for military purposes in carrying on the late rebellion against the United States, if known to the lender at the time, is illegal, against public policy, and no action can be maintained on it.—*Oxford Iron Co. v. Spradley* 99
15. *Plea to disability of one of joint makers, and to consideration.*—In a suit against one of the makers of a promissory note, a plea by the defendant that his co-maker was, at the time of making the note, a married woman and principal in said note, and that he signed it as her surety, is subject to demurrer. So, also, is a plea that the consideration of the note was the hire of a slave.—*Crumbley v. Searcey* 328
16. *Conversion of promissory note ; measure of damages.*—In trover for a promissory note, the measure of damages is, *prima facie*, the value on its face. But the insolvency of the parties liable thereon may be shown in mitigation of damages.—*McPeters v. Phillips*.. 496

BILL OF LADING.

1. *Negotiability of.*—A bill of lading is only *quasi negotiable*, and is not subject to the rule that the owner of negotiable paper can not protect himself against a *bona fide* holder for valuable consideration, on the ground that he did not authorize it to be used except for some particular purpose.—*Voss & Co. v. Robertson, Brown & Co.* 483
2. *Construction of.*—A bill of lading is a contract, the language of which is subject to the rules of construction which govern other contracts.—*Logan v. Mobile Trading Co.* 514
3. *Same ; recitals and stipulations in, obligation and effect of.*—The recitals and stipulations of a bill of lading were as follows: "Shipped in good order and condition by Jewett, Hall & Co. ———— (on account and risk of whom it may concern) on board the good steamboat called the Virginia and Mobile Trade Company, whereof ———— is master, for the present voyage, now lying at the port of St. Louis, Mo., and bound for Montgomery, Ala., the following packages or articles marked and numbered as below, which are to be delivered, without delay, in like good order and condition at the aforesaid port, (the damages of the river, fire and unavoidable accident only excepted,) unto Rufus L. Logan or their assigns, he or they paying freight for said goods at the rate of 30 cents per 100 lbs. to New Orleans, \$1.98 per bbl, flour (through), and \$6.35 per cask, \$3.05 per tierce bacon, and 93 cents per box

BILL OF LADING—CONTINUED.

crackers, thence to Montgomery In witness whereof, the owner, master or clerk of said steamboat subscribes to four bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void. Dated at St. Louis, Mo., this 2d day of October, 1866." (Here follows a description and weight of the goods.) "Privilege of re-shipping at New Orleans and Mobile," (signed,) "Jewett, Hall & Co., Agt's M. T. Co." "It is understood and agreed that the above goods are to be sent through at above rates if any boats are going through to Wetumpka." (signed,) "Jewett, Hall & Co., Agt's Mobile Trade Co." *Held*, that it imposes an obligation on the party making it to send the goods therein named "through to Wetumpka," either from Mobile or Montgomery, "if any boats are going through to Wetumpka," when the goods are delivered either at Mobile or Montgomery.—*S. C.*..... 514

4. *Same*.—If such goods are so forwarded by the party making said bill of lading, to Wetumpka, either from Mobile or from Montgomery, the said party becomes liable for illegal injuries to the same whether sent by boats of the maker of the bill of lading, or by those of another owner.—*S. C.*..... 514

BLOCKADE.

1. *By government, of its own ports ; contract to violate*.—A government, during a rebellion against its authority, may legally blockade its own ports in possession of the insurrectionary authorities ; and a contract to violate such blockade is illegal and cannot be enforced.—*Ingersoll v. Campbell*..... 282
2. *Same ; what contract growing out of, may be enforced*.—But money earned upon such a contract and paid to the party earning it, vests in the person so earning it a good and legal title ; and if after such payment he deposits or leaves such money with a person to keep for him, he may recover it from him, although the person with whom the money was so left, as agent for another, made the contract to violate such blockade.—*S. C.*..... 282

CERTIORARI.

1. *To commissioners court ; when will not be granted*.—A certiorari will not be granted at the instance of an individual tax-payer, and in his name, to revise the proceedings of the court of county commissioners appointing an agent "for the issuing of the rations to the indigent persons of the county," and ordering his payment out of county treasury.—*Benton v. Taylor*..... 388

CHANCERY.

I. JURISDICTION.

1. *Discovery and account*.—Where the funds of a partnership, dissolved by the death of one of the partners, have been used by the survivor in the business of his partnership with another, the administrator of the deceased partner may recover the interest of

CHANCERY—CONUINUED.

- non* is pending. The distributees are parties in interest, unless the estate is declared insolvent, and may be so afterwards.—*S. C.* 354
- his intestate by a bill for discovery and account against the representative of the survivor who has died, and his surviving partner. *Costley v. Towles* 660
2. *Same*.—In such a suit the complainant may recover against the said surviving partner the amount found due from him to the first partnership, that being the prayer of the bill, and there being an agreement between him and the administrator of the other partner that he should settle the partnership matters.—*S. C.* 660
3. *Discovery*.—In order to sustain jurisdiction for relief sought, consequent upon a discovery, the bill or cross-bill must allege that the facts are material; that their discovery by the defendant is indispensable, and that the plaintiff is unable to prove such facts by other testimony. The failure to allege these facts subjects such a bill to demurrer.—*Guice v. Parker* 616
4. *Dower*.—The chancery courts of this State have original jurisdiction to entertain suits for dower concurrent with the courts of law, especially where there is a purchaser under execution title in possession of the lands at the death of the husband, and there is necessity for an account for mean profits, by way of damages, between the tenant of the lands and the claimant of the dower interest. *Irvine v. Armistead* 363
5. *Estates of decedents*.—The executors of an estate were indebted to an attorney for services rendered during their administration, and he was indebted to them for money of the estate loaned to him, the payment of which was secured by a mortgage. On final settlement they charged the estate in their favor with the value of his services, but failed to execute an agreement with him to credit his debt with the amount allowed to them,—*Held*, that a bill in chancery by him to enjoin a sale of the mortgaged property by the administrator of a distributee to whom his debt and mortgage had been transferred in the distribution of the estate, and to credit the amount due him for services, was without equity.—*Gardner v. Pickett* 191
6. *Same*.—Section 2274, Revised Code, seems to authorize a review in the chancery court of the final settlement of a decedent's estate in the probate court, upon specified errors positively charged, little short of the right and privilege of appeal.—*Meadows v. Edwards and Brassell* 354
7. *Bill by minors to correct errors in final settlement; when not without equity*.—When, in such settlement, a decree has been rendered in favor of the administrator, a bill filed by minor distributees alleging that they were represented only by a guardian *ad litem*, and specifying errors equal in amount to the decree, is *not* without equity.—*S. C.* 354
8. *Final settlement of administrator in chief, sufficient to support bill to correct errors*.—The final settlement of the administrator in chief is sufficient to support the bill, although an administration *de bonis*

CHANCERY—CONTINUED.

- non* is pending. The distributees are parties in interest, unless the estate is declared insolvent, and may be so afterwards.—*S. C.* 354
9. *Settlement of guardianship.*—A bill which shows that the guardian accounted regularly during his life for his ward's estate, but died before final settlement, and that the final settlement was made by his representative after death, and when the decree on such settlement seems regular on its face, is demurrable for want of equity, unless it shows that the decree was erroneous by reason of mistakes or fraud. A mere allegation that there were sums of money in the guardian's hands unaccounted for, without showing what they were, or fraud or mistake, is not enough to give equity jurisdiction.—*Bibb and Wife v. Carpenter*..... 584
10. *Same*—It is a sufficient ground for transferring, at the suit of the ward, the settlement of a guardianship account from the probate to the chancery court, that the guardian was a certificated bankrupt, and died leaving no estate whatever.—*Jones & Culom v. Knox*..... 43
11. *Infants.*—If a bill be filed relative to an infant's estate or person, the chancery court acquires jurisdiction, and the infant, whether plaintiff or defendant, immediately becomes a ward of the court. *Rivers v. Durr*..... 418
12. *Same; when decrees of are binding on infants.*—Decrees made in suits by infant plaintiffs, are as binding upon them as upon adults.—*S. C.* 418
13. *Same; power of to change property of.*—Whether the chancery court has or has not jurisdiction to sell the real estate of tenants in common for division, lands so sold at the suit of an infant, when that is the only objection to the sale, may be referred to the power of the court to change the property for the benefit of the infant, when the infant seeks to recover the land from the purchaser by action of ejectment.—*S. C.*..... 418
14. *Partition.*—In this State, the court of chancery has no jurisdiction to decree the sale of the lands of a tenant in common, who is of full age, without his consent, for the purpose of partition, because the same can not be equitably divided.—*Oliver v. Jernigan*... 41
15. *Same.*—If the lands of tenants in common of full age are not susceptible of an exact division, an allotment may be made in unequal shares, with compensation for the inequality, by creating a rent or charge upon the land; or, if the land allotted to one exceeds in value that allotted to the other, the court may compel the former to make compensation to the latter, for equality of compensation.—*Ib.* 41
16. *Same; rules as to partition of lands, title of which is in dispute, to what applies.*—The general rule, that partition will not be decreed in equity where the title is in dispute, applies to a legal and not an equitable title; and if, on a bill of partition, the defendant wishes to avail himself of an equitable defense, as, for instance, a defense arising out of a contract for purchase, &c., he must file a cross-bill, or, under our system, he may set it up in his answer in the nature of a cross-bill, and pray such relief as he may believe he is entitled to.—*S. C.*..... 41

CHANCERY—CONTINUED.

17. *Separate estate of married woman; what will be subjected in equity to payment of note executed by her during coverture.*—Where a *feme sole*, in contemplation of marriage, by an ante-nuptial deed conveys her property to a trustee, in trust to her sole and separate use, for the support and maintenance of her intended husband and herself, and such children as they may have, chancery will charge it with the payment of a promissory note, made by her after the marriage, for her own debt; and a bill filed for that purpose need not state that the debt was contracted for "family supplies or maintenance."—*Brame v. McGee*..... 170
18. *Reformation of deeds; lost deeds.*—A court of chancery has ample jurisdiction to reform deeds and other written instruments, on the ground of mistake, even upon parol evidence, where no statutory provision intervenes to prevent it; and where a conveyance of lands has been accidentally lost or destroyed, so that the purchaser is, thereby, unable to show a good title, the vendor may be required to make the purchaser another deed.—*Hudspeth v. Thomason*..... 470
19. *Same; what no defense to.*—On a bill, by a vendee, to correct a mistake in the description of the land bought, it is no defense that the vendor was paid in Confederate treasury-notes, if voluntarily received by him, where the vendee is chargeable with no deceit or fraud on his part.—*S. C.*..... 470
20. *Vendor's lien; when exists; how may be enforced.*—L., the vendee, being indebted to H., the vendor, for the purchase-money of land, the indebtedness constituting a vendor's lien thereon, L., at the request of H., gave his promissory note to S., a creditor of H., for the amount due by H., and received a corresponding credit from H. for the amount of the note given S., all the parties agreeing at the time that the note thus given to S. should carry with it a vendor's lien to the amount of the note,—*Held*, that S. might enforce a vendor's lien on the land by bill in equity against L., and that H. was a proper party defendant to the bill.—*Latham v. Staples*..... 462
21. *Purchaser; when chargeable with notice of trust.*—A purchaser of land from a vendor who claims it as his own, but who has no legal title except as trustee for another, is chargeable with notice of the trust.—*Dudley v. Witter*..... 664
22. *Same.*—A purchaser, charged with constructive notice only of a trust, should not be held a trustee *in invitum*, when a mere want of caution, as distinguished from fraudulent and willful blindness, is all that can be imputed to him.—*S. C.*..... 664
23. *Order of court authorizing trustee to sell land; to what sale can not be referred.*—A sale of land as his own, by a vendor who is in possession as trustee of another, can not be referred to an order of court authorizing him to sell, as trustee, made several years before, when it was not so intended by him and the purchaser.—*S. C.*.... 664

CHANCERY—CONTINUED.

II. PLEADING AND PRACTICE.

24. *Parties to bill for settlement of guardian's account.*—A bill filed to impeach a decree of the court of probate, on the final settlement of a guardian, or to charge the sureties of such guardian on his bond for funds which such guardian failed to account for on such settlement, is demurrable, for want of proper parties defendant, when it fails to make the administrator *de bonis non* of such guardian a party defendant, if within the jurisdiction, and the estate is not utterly worthless.—*Bibb and Wife v Carpenter*. 583
25. *Same.*—But, if the guardian was a certificated bankrupt at the time of his death, and left no estate whatever, and no letters of administration have been granted on his estate, the bill may be maintained against the sureties alone.—*Jones & Cullom v. Knox*. 53
26. *Parties to bill to reform deed and enforce vendor's lien.*—If A buy lands of B, and pay for them, and receive B's deed for the same, in which, by the inadvertence and mistake of B, the lands are misdescribed, and after A's purchase, and before the mistake is discovered, A sells the same lands to C, the brother of B, who pays half the purchase-money, and gives his promissory note for the remainder, and takes A's bond for titles; if after the mistake is discovered, B refuses to correct the mistake, and he and C combine and confederate together to prevent the correction of the mistake, and, also, to avoid the payment of the remainder of the purchase-money, on the part of C, A may join both in a bill to correct the mistake, and to set up and enforce his lien on the lands for the unpaid purchase-money.—*Hudspeth v. Thomason*. 470
27. *Amendment of bill.*—The executors of an estate were indebted to an attorney for services rendered during their administration, and he was indebted to them for money of the estate loaned to him, the payment of which was secured by a mortgage. On final settlement they charged the estate in their favor with the value of his services, but failed to execute an agreement with him to credit his debt with the amount allowed to them,—*Held*, that a bill in chancery by him to enjoin a sale of the mortgaged property by the administrator of a distributee to whom his debt and mortgage had been transferred in the distribution of the estate, and to credit the amount due him for services, was without equity; and that an amendment to such a bill, setting up a claim of another person to the mortgaged property as a prior incumbrancer, is an inadmissible departure from the original bill.—*Gardner v. Pickett*. 191
28. *Original and amended bill; form but one bill.*—In chancery, the bill and amended bill make but one suit. And when the original bill waives the answer on oath, and the amended bill requires that the answer to it shall be on oath, and the only answer filed is the answer to the amended bill, and the cause is heard on the bill and answer, the answer is only to be taken as true so far as it is responsive to the amended bill.—*Taunton & Brooks v. McInnish*. 619
29. *Same.*—In such a case, if the answer admits the material allegations of the original bill, and sets up new matter in defense to the

CHANCERY—CONTINUED.

- original bill, by way of cross-bill, which is denied by the answer to the cross-bill, and the cross-bill is demurred to and is without equity, the chancellor may decree the relief asked by original bill without testimony to support it, so far as it is admitted.—*S. C.* . . . 619
30. *Cross-bill without equity; allegations of, effect of.*—An answer to an amended bill may be turned into a cross-bill, but if the cross-bill thus made is without equity, the allegations of the cross-bill will not be permitted to serve the purposes of an answer and cross-bill, so as to overturn the allegations of the original bill by the new matter contained in it, which is inconsistent with the allegations of the original bill and the amended bill so far as they are repeated in the amended bill.—*S. C.* . . . 619
31. *Cross-bill; without equity when allegations of could be made fully available as matters of defense by proper answer.*—A cross-bill is an auxiliary suit dependent on the original bill. And if the matters of such cross-bill are set up in the answer in the nature of a cross-bill, and it turns out that such matters are merely a defense available under the answer, or are sought by way of discovery, and that no decree need be made on the cross-bill for the defendant's relief, which could not be made on the original bill without cross-bill, such cross-bill will be dismissed for want of equity.—*S. C.* . . . 619
32. *Waiver of cross-bill.*—A bill to reform a deed, and to enforce a vendor's lien, if the defendants make their answers a cross-bill, but take no steps to obtain an answer to their cross-bill, and go to a hearing on the original bill, answers, and cross-bill and exhibits, the chancellor may dismiss the cross-bill, or treat the same as waived on the part of the defendants, and proceed to decree the relief prayed in the original bill, if the admissions in the answers will authorize it.—*Hudspeth v. Thomason.* . . . 470
33. *Revised Code, §§ 3367-8; what requires as to cross-bill allowed by.* The statute of this State, which allows an answer to a bill in chancery to be turned into a cross-bill, requires that such cross-bill shall be heard at the same time as the original bill, whether the same be heard upon demurrer or upon the merits.—*Revised Code, §§ 3367-8.*—*Ex parte Thornton.* . . . 384
34. *Mandamus lies to compel reinstatement of cross-bill dismissed before final determination of cause.*—And as no appeal lies from an order of the chancellor dismissing such cross-bill, before the final determination of the cause, *mandamus* is a proper remedy to compel the setting aside of such an order of dismissal and the restoration of such cross-bill upon the docket, to abide the final determination of the whole cause.—*S. C.* . . . 384
35. *Commission to take answer of non-resident defendant; when invalid.* A commission to take the answer of a non-resident defendant to a bill in chancery, issued by the register in blank, as to the name of the commissioner, is invalid; and the request of the register to the person receiving it to insert his name as commissioner does not legalize the act.—*Guice v. Parker.* . . . 616
36. *Answer required and made under oath; what not overcome by*—The

CHANCERY—CONTINUED.

- answer of a defendant to a bill in chancery, when required on oath, and responsive, is not overcome by the testimony of the complainant as a witness.—*Marshall v. Howell*..... 318
37. *Unsworn answer, denials in; when prevail*.—When a cause is heard upon the bill and exhibit to the bill, the answer and exhibits to the answer of one of the defendants, and a decree *pro confesso* against the other defendant, and the complainant has waived the oath of the defendants to the answers, and there is no testimony taken by any of the parties, and the answer submitted on the hearing is a responsive denial of all the grounds of equity alleged in the bill, such an answer must prevail against the bill.—*Latham v. Staples*..... 462
38. *Unsworn answer, effect of; what required to overturn*.—An unsworn answer does not lose all force as evidence in a cause where it is responsive to the bill. It only changes the rule that requires the testimony of two witnesses, or one witness and strong corroborating circumstances, to overturn it. A mere preponderance of evidence is sufficient for that purpose.—*S. C.*..... 462
39. *Register, report of; objection to, when can not be raised for first time in this court*.—If the report of the register is permitted to be confirmed in the court below, without objection or exception, it can not be attacked in this court for the first time, when it is regular on its face.—*Taunton & Brooks v. McInnish*..... 619
40. *Waiver of objection to plaintiff's letters of administration*.—That the plaintiff's letters of administration were granted by a court of the late Confederate States, is an objection which can not be raised for the first time in the appellate court.—*Cosley v. Towles*..... 660
41. *Decree pro confesso; when properly set aside*.—A decree *pro confesso* against a defendant, rendered by one whom the register appointed to represent him during his absence, is properly set aside by the chancellor.—*Meadows v. Edwards & Brassell*..... 354
42. *Decree on facts of case; when only will be reversed*.—A decree of the chancery court on the facts of a case, will not be reversed unless decidedly contrary to the weight of evidence.—*Marshall v. Howell*..... 318
43. *Same*.—When the decree of the chancellor is not opposed to the evidence on which it is based, it will not be reversed because the evidence which supports it is weak and suspicious. Before such a decree is disturbed, there must be a strong preponderance of the evidence against it.—*Kennedy v. Marrast*..... 161
44. *Final decree on reversal, when will not be rendered by supreme court*. A decree will not be rendered here, when it is possible that a different result, more favorable to justice, might be obtained by remanding the cause.—*Latham v. Staples*..... 462
45. *Registration of decree*—Recording a decree of the chancery court vesting title to real property, under the statute (Clay's Dig. p. 354, § 57,) was not necessary to its validity, but was notice of its contents, as the record of a deed under the registration laws.—*Dudley v. Witter*..... 664

CHARGE OF COURT.

1. *When presumed to be abstract.*—Where all the evidence is not set out in the bill of exceptions, it will be presumed, in order to sustain the refusal to give a charge, that it was abstract and not supported by the evidence delivered on the trial.—*Ingersoll v. Campbell*..... 282
2. *Charge ignoring proof of venue.*—Where all the evidence is set out, and there is no proof of venue, it is error to refuse to charge the jury “that even if they believe the evidence they can not find the defendant guilty.” Such a refusal ignores the necessity of proof of venue.—*Clark v. The State*..... 307
3. *Charge on effect of evidence.*—A charge on the effect of the evidence should not be given, unless at the request of one of the parties; but when it is clear that no injury has resulted, the judgment will not be reversed.—*Dugger v. Tayloe*..... 320
4. *Special charge; when not error to refuse.*—It is not error for the court to refuse to give a special charge, the substance of which has been plainly given in other special charges, or in the main charge. *Rivers v. Thompson*..... 335
5. *Charge limiting the examination of the jury; when erroneous.*—A charge asked, that tends to limit the examination of the jury to a part only of the evidence, to the exclusion of other important evidence in the case, is erroneous, and should be refused.—*Darnell v. Griffin*..... 520
6. *Charge too favorable to appellant.*—A charge of the court which is more favorable to the defendant objecting to it than the testimony justifies, is, at most, but error without injury, and is not a ground for reversal.—*Wilcoxon v. Reynolds*..... 529
7. *Ambiguous charge.*—When a charge is of such doubtful meaning as to leave it uncertain whether it would produce a correct result or not, the party objecting to it must show that he would be injured by it. Any process that will reach a correct result is sufficient.—*S. C.*..... 529
8. *Charge asked verbally; may be modified.*—A charge asked verbally is not required to be given in terms.—*Warren v. The State*..... 549
9. *Abstract charge, refusal of; not ground for reversal.*—A judgment will not be reversed for an abstract charge, though its refusal would have been error, had it not been abstract.—*Stewart & Hudson v. Cole & Son*..... 646
10. *Charge to jury; what erroneous.*—Charges which present the erroneous and unreasonable belief of the accused, respecting certain alleged provocation of the deceased, and the accused’s transport of rage in consequence, as reasons why he should be acquitted, without any defense or evidence of insanity, are properly refused. *Flanagan v. The State*..... 703

CODE OF ALABAMA.

1. § 795. What orders are grantable as of course.—*Boyton v. Nelson*. 501
2. § 830. Notice of special term of commissioners court.—*Ex parte Selma and Gulf Railroad Co.*..... 230
3. §§ 907, 926. Claims against county.—*Jackson v. Dinkins*..... 69

CODE OF ALABAMA—CONTINUED.

Also, <i>Dale County v. Gunter</i>	118
4. § 1186. Tax on insurance companies for benefit of Mobile medical college.— <i>Medical College v. Muldon & Sons</i>	603
5. §§ 1399-1406. Railroad companies; liability for stock killed.— <i>Mobile and Ohio Railroad Co. v. Malone</i>	391
6. §§ 1450-62. Apprentices.— <i>Cochran v. The State</i>	714
7. § 1630. Widow's quarantine.— <i>Pizzala v. Campbell</i>	35
8. § 1838. Indorsement of written contract.— <i>Hart v. Shorter & Baker</i>	453
9. § 1862. Consideration of guaranty.— <i>McQuaid v. Powers and O'Donnell</i>	45
10. §§ 2022, 2029. Removal of executor.— <i>Crawford v. Tyson</i>	299
11. § 2061. Property exempt from administration.— <i>Barwick v. Rackley</i>	402
12. § 2196. Filing claims against insolvent estate.— <i>Clement v. Nelson</i>	634
Also, <i>Prestridge v. Patrick Irwin & Co</i>	653
13. § 2274. Bill in chancery to review probate decrees.— <i>Meadows v. Edwards & Brassell</i>	354
14. §§ 2370-88. Separate estates of married women.— <i>Ryan v. Bibb</i>	323
Also, <i>Hall v. Creswell</i>	460
<i>Wright and Wife v. Snedecor</i>	92
<i>Stone & Matthews v. Gazzam</i>	269
15. § 2523. Who is proper party plaintiff.— <i>Hart v. Shorter & Baker</i>	453
16. §§ 2593-98. Actions for recovery of personal property in specie.— <i>Eslava v. Dillihunt</i>	698
17. § 2682. Proof of written contract sued on.— <i>Oxford Iron Co. v. Spradley</i>	98
18. § 2704. Competency of witnesses.— <i>Waldman v. Crommelin</i>	580
19. § 2804. Security for costs by corporation.— <i>Ex parte Locke</i>	77
20. § 2884. Exemption statute.— <i>Webb v. Edwards</i>	17
21. § 2928. Attachments.— <i>Stewart & Hudson v. Cole & Son</i>	646
22. §§ 3367-8. Cross-bill in answer.— <i>Ex parte Thornton</i>	384
23. § 3486. Appeals from interlocutory decrees.— <i>Thornton v. Kyle</i> ..	379
24. § 3555. Carrying concealed weapons.— <i>Evins v. The State</i>	88
25. § 3612. Disturbing religious worship.— <i>Brown v. The State</i>	175
26. § 3618. Retailing spirituous liquors.— <i>Campbell v. The State</i>	116
Also, <i>Lillensteine v. The State</i>	498
27. § 3706. Indictment for stealing horse.— <i>Maynard v. State</i>	85
28. §§ 3757-59. Fine in criminal cases.— <i>Nelson v. The State</i>	185
29. § 4143. Amendment of indictment.— <i>Gregory v. The State</i>	151
Also, <i>Johnson v. The State</i>	212
30. § 4171. Right to copy of indictment and list of jury.— <i>Robinson v. The State</i>	9
Also, <i>Flanagan v. The State</i>	703
31. § 4244. Undertaking of bail.— <i>Merrill v. The State</i>	82
32. § 4343. Solicitor's fees.— <i>Brown v. The State</i>	148

COMMON CARRIERS.

See BAILMENTS, 5-8.

CONSTITUTIONAL LAW.

1. *Act to authorize governor to fill vacancies in certain offices ; not unconstitutional.*—The act of the general assembly of Alabama, entitled "An act to authorize the governor to fill vacancies in certain county offices," approved November 25, 1868, is not unconstitutional and void, but a valid constitutional act of the general assembly of this State, and authorizes the governor to fill all vacancies in the offices provided for by said act.—*Falconer v. Robinson*..... 340
2. *Same ; persons appointed under, hold for what term.*—Persons appointed by the governor, and duly commissioned by him, by virtue of said act, hold their office until the next general election to be held after their appointment.—*S. C.*..... 340
3. *Same ; not necessary to set out all laws repealed by.*—It was not necessary that the laws in conflict with said act, and repealed by the third section thereof, should be set out and contained in said act ; said act is not a revisory or amendatory act within the purview and meaning of article 4, section 2, of the constitution of this State. *S. C.*..... 340
4. *Act to loan three per cent. fund, &c.*—The act of the general assembly of this State, entitled "An act to loan and appropriate the three per cent. fund and its interest," approved February 18, 1860, is a constitutional law.—Pamph. Acts 1859–60, p. 54, Act No. 68.—*Ex parte Selma & Gulf Railroad Co.*..... 423
5. *Charter of railroad company creates a contract.*—The charter of a railroad company is a contract which is protected by clause 1, section 10, of article 1, of the constitution of the United States, unless the charter is by its terms repealable.—*Ala. & Fla. Railroad Co. v. Burkett.* 569
6. *Same ; how can not be impaired.*—A State can not impair the obligation and privileges secured by such a charter, either by its constitution or its laws. The prohibition is on the State by whatever means it acts.—*S. C.*..... 569
7. *Same ; what not affected by.*—The twenty-fifth section of the first article, and the fifth section of the thirteenth article of the present constitution of the State do not operate upon railroad charters granted by the State before the adoption of the present constitution, unless such charters were made repealable when granted.—*S. C.*... 569
8. *Article 4, section 2, as to amendatory law.*—Section 2, article 4, of the constitution of Alabama, which requires the repeal of the sections of an act that are amended, imposes on the legislature the duty of formally repealing them ; but when the general assembly fails to repeal the sections amended, they are repealed by virtue of the constitution.—*Medical College v. Muldon & Sons.*..... 603
9. *Personal presence of prisoner on trial for indictable offense.*—No person indicted for a criminal offense, whether it be for a felony or a misdemeanor, can be tried without being personally present in court, and a judgment rendered upon a conviction obtained in his absence, if for a fine only, is erroneous, and will be reversed on appeal.—*Slocovitch v. The State*..... 227
10. *Act of Feb. 14, 1870, regulating bills of exception, retroactive and*

CONSTITUTIONAL LAW.—CONTINUED.

- constitutional*.—A bill of exceptions signed by agreement of the parties on the 8th of June, 1869, before the passage of the "act relating to bills of exceptions," approved February 14, 1870, is made good by that act. This law has a retroactive effect; and it regulates a matter of practice, and does not impair vested rights.
- Wharton v. Cunningham*..... 590
11. *Imprisonment for debt*.—Whether the defendant in a criminal case, being convicted, and failing to pay or secure the costs, can be imprisoned until they are paid, *quere*.—*Nelson v. The State*..... 186
12. *Municipal corporations; effect of civil war on franchises and powers of*.—The late revolution, in this State, did not suspend the right to the exercise of the franchises of an incorporated town in this State, within the lines of the insurrectionary forces. Such incorporated town or city might still make legal contracts, upon which it would be bound, notwithstanding it was under the control of the insurgent power.—*City of Selma v. Mullen*..... 411
13. *Charter of "Mutual Aid Association"*.—The act of the general assembly of this State, approved December 10, 1868, creating the Mutual Aid Association, authorizes said association to set up and carry on a lottery such as is sanctioned by said act, and for the purposes therein named. Said act confers upon the partners in said association, after the payment of the sum of \$2,000 into the State treasury, as required by the fourth section thereof, the privilege of setting up and carrying on a lottery, such as is authorized by said act, for one year, and a repeal of the act granting this privilege can not take it away during the time for which the payment has been made.—Pamph. Acts 1870-71, p. 217.—*Boyd & Jackson v. The State*..... 329

CONTINUANCE.

1. *Although matter of discretion, when reviewable*.—A continuance and its terms is a matter of discretion, and not reviewable unless the conditions required amount to an improper and unjust abuse of the discretion.—*Dudley v. Witter*..... 664

CONTRACTS.

1. *Assent of parties; to what has not reference*.—The principle of the law of contracts, that both parties must assent to the same thing, and in the same sense, has no reference to the misconceptions of the parties not authorized by the terms of the agreement.—*Thompson v. Ray*..... 224
2. *What contracts not void as against public policy*.—In March, 1864, after the capture of Memphis by the United States forces and the retreat of the rebel army from Corinth, which events occurred in 1863, the insurrectionary forces did not hold such control over the citizens of the county of Lauderdale in this State, as to render contracts between citizens of said county and citizens of Kentucky,

CONTRACTS—CONTINUED.

- for necessities for the family or plantation, void, as against the public policy of the United States.—*Hawkins v. Boggs*..... 15
3. *Contract to violate blockade*.—A government, during a rebellion against its authority, may legally blockade its own ports in possession of the insurrectionary authorities; and a contract to violate such blockade is illegal and cannot be enforced.—*Ingersoll v. Campbell*..... 282
4. *Same*.—But money earned upon such a contract, and paid to the party earning it, vests in the person so earning it a good and legal title; and if after such payment he deposits or leaves such money with a person to keep for him, he may recover it from him, although the person with whom the money was so left, as agent for another, made the contract to violate such blockade.—*S. C.*..... 282
5. *Contract by municipal corporation during late civil war; what contract approved by law of land and public policy*.—A contract by a city corporation with a physician, entered into during the late rebellion, to attend to indigent persons sick with the small-pox, whether belligerents or non-combatants, is not such a contract as is forbidden by the law of the land or the public policy. Attention to the sick is a duty of humanity that no law of this State condemns.—[SAFFOLD, J., not sitting.].—*City of Selma v. Mullen*... 411
6. *Contract against public policy*.—A promissory note by an iron company, for money or other thing loaned to it, to be used by the company in erecting iron works and making iron for the late Confederate government for military purposes in carrying on the late rebellion against the United States, if known to the lender at the time, is illegal, against public policy, and no action can be maintained on it.—*Oxford Iron Co. v. Spradley* 99
7. *Same; agreement to become bail; when void*.—An agreement by which one party receives a sum of money to become the bail of another accused of felony, in order that a defendant may be released from custody, so as to escape trial, is void, as obstructing or interfering with the administration of public justice. Money paid under such an agreement can not be recovered back.—*Dunkin v. Hodge*..... 523
8. *Cotton sold for Confederate money; when trover will lie against vendor for conversion of*.—Although Confederate treasury-notes can not be considered a sufficient consideration to support a contract for the sale of property; yet where cotton was sold during the late war for which payment in such currency was accepted, if the vendor ceased to hold the cotton as owner and became the bailee of the purchaser, the latter may maintain trover against him, if he converts it.—*Block v. McNeil*..... 283
9. *Confederate currency as consideration*.—W., representing to the wife of M. that he had agreed with her husband for the purchase of his land, received from her the possession, and gave her, as part of the consideration, certain notes of her husband, founded upon valuable consideration, and the value of the rent of another place to which she removed, all of which he procured with Confederate cur-

CONTRACTS—CONTINUED.

- rency. W., repudiating the transaction as a sale of his land, but acknowledging the benefit that accrued to him by having his notes taken up, adjusted the matter with W., by agreeing to pay him a specified sum in Confederate currency, less the rent of his own land during W.'s possession of it.—*Held*, that, in a suit by W. on this agreement, a charge that the jury must find for the defendant, was erroneous; and that the measure of recovery is the value, at the time of the contract, the true and legal consideration for which the specified sum in Confederate currency was agreed to be paid, less the rent due the defendant.—*Whitley v. Moseley*..... 480
10. *Contract dischargeable by payment of Confederate money; measure of damages for breach of*.—In estimating the damages on a contract for payment of a sum of money in Confederate currency or treasury-notes, the true criterion is the value of the property sold, in lawful money, at the date of the sale, and not the value of the Confederate currency at the time the debt becomes due.—*Wharton v. Cunningham*..... 590
11. *Contract; what will support joint action; what attestation sufficient where obligor makes his mark*.—A written contract for the construction of a house for a specified sum of money, signed by the parties, with an obligation beneath as surety for the faithful performance of the contract by the builder, signed “Phillip ^{his} O'Donnell,” and _{mark.} attested by two witnesses, whose names are written on the same page, but midway between those of the principals and the surety, was offered in evidence to support a suit for damages for non-performance of the contract prosecuted against the builder and surety jointly.—*Held*, 1st. It was an attested instrument, the execution of which could be proved by one of the subscribing witnesses. 2d. The signature of the surety was shown to be complete by the testimony of the witness that the writing was executed by all the parties at the same time and place, and that he and the other witness signed it as witnesses with the assent of all the parties, and in their presence. 3d. As an obligation to answer for the default of another, a sufficient consideration was expressed. 4th. A joint suit against the defendants might be maintained upon it.—*McQuaid v. Powers & O'Donnell*..... 45
12. *Past consideration; signing note as surety*.—The signing of her husband's note, previously made and delivered by him, by a wife, as his surety, does not impose on her any obligation which will sustain its subsequent recognition.—*Hetherington v. Hixon*..... 297
13. *Same*.—Where a widow gave her note, secured by mortgage, for the payment of her deceased husband's debt, at the instance of the promisee, the mere fact that his notes were given up to her is not proof of a valid consideration. It must be shown that obtaining the notes, as something of value, entered into the inducement to her agreement.—*S. C*..... 297
14. *Same*.—In such a case, loss subsequently sustained on account of a failure to file the notes as claims against his insolvent estate, can

CONTRACTS—CONTINUED:

not create a consideration, although the non claim was in consequence of the creditor's belief that he had otherwise secured their payment.—*S. C.*..... 297

CORPORATIONS.

1. *Corporation aggregate ; what admits corporate character of.*—Where the defendant is sued as a corporation aggregate, the appointment of an attorney, and an appearance entered by him, is an admission of record of the corporate character of the defendant.—*Oxford Iron Co. v. Spradley*..... 98
2. *Manufacturing and other corporations ; what powers have.*—Manufacturing and other like corporations in this State, unless expressly prohibited by their charters, may borrow money, and make and receive promissory notes and bills of exchange, in carrying on their lawful business. The presumption is in favor of the validity of notes and bills of exchange made by and to such corporations, and that they are made in the lawful course of their business, until the contrary is shown.—*S. C.*..... 98
3. *Forfeiture ; can only be taken advantage of by direct proceeding.*—A cause of forfeiture can not be taken advantage of, or enforced against a corporation collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation.—*Hudgins v. The State* 208
4. *Same.*—On an indictment under section 2 of the act entitled "An act to incorporate the Fort Browder male academy, in Barbour county," approved February 8, 1858, for selling spirituous liquors or wines within half a mile of said academy, except for medical purposes, it can not be collaterally shown, as a defense, that the charter granted by said act has been forfeited by *non-user*, or otherwise.—*S. C.*..... 208
5. *Plea of nul tiel corporation.*—A corporation, when sued on a contract made by it, can not plead *nul tiel* corporation, unless in case of misnomer or dissolution.—*McCullough v. Talladega Ins. Co.*... 376
6. *Private corporations ; books of, competency as evidence.*—The competency as evidence of the books of a private corporation is not destroyed because they had been for some time in the possession of the attorneys of the corporation, who brought them into court and delivered them to the attorneys of the opposite party, for use as evidence in the pending trial, there being no suspicion or claim of fraud on their part.—*S. C.*..... 376
7. *Municipal corporations ; effect of civil war on franchises and powers of.*—The late revolution, in this State, did not suspend the right to the exercise of the franchises of an incorporated town in this State, within the lines of the insurrectionary forces. Such incorporated town or city might still make legal contracts, upon which it would be bound, notwithstanding it was under the control of the insurgent power.—*City of Selma v. Mullen*..... 411
8. *Same ; when bound by parol contract, and liable in assumpsit.*—A corporation may make a legal contract by parol, unless the statute

CORPORATIONS—CONTINUED.

- of incorporation or some by-law of the corporate body forbids it. The corporation of a town or city is not exempt from this rule. And when this is the case, an action of assumpsit lies against such corporation upon an express or an implied promise.—*S. C.*..... 411
9. *Same; what is competent evidence to show employment by.*—M., the city physician of an incorporated town, duly elected to his office by the corporate authorities, wishing to be paid *extra* compensation for attention to *small-pox cases*, went before the town council and requested to know what extra compensation would be allowed him, and was told in reply to his request, by one of the councilmen in hearing of all the others of the council then present in the council-room and engaged in their regular business, and without any objection from any councilman present, “*Doctor, go on with your small-pox cases, and we will do what is just and right; can’t you take our faces for that?*”—*Held*, that this is competent evidence for M. in a suit against the corporation for extra compensation for services in such small-pox cases, in connection with other proof that such services were performed and accepted by the corporation, when the action is “on account or verbal contract.”—*S. C.*..... 411
10. *Same; what such declaration estops city from doing.*—After such a declaration, the corporation is bound to pay what is just and right for the extra services thus rendered. And the corporation can not, by resolution of the council or by-law, fix the amount of extra compensation without the assent and concurrence of M., the physician.—*S. C.*..... 411
11. *Same; receipts may be explained.*—If the council of the town or city fix this extra compensation at a certain sum, and this sum is paid to M., the receipts given for the sums thus paid do not estop him from showing, in a suit on his account for extra services, that he did not consent to receive the sums thus paid in full satisfaction of his claim.—*S. C.*..... 411
12. *When action for borrowed money lies against a corporation.*—A private corporation, authorized to “borrow money, and issue their bonds therefor,” may be sued on the obligation they give for the re-payment of borrowed money, whether it be under seal or not. *McCallough v. Talladega Insurance Company* 376
13. *Foreign corporation; when may be sued by summons and complaint.* A foreign corporation, doing business in this State through a managing agent or employee, may be sued by summons and complaint, served on such agent or employee, upon a cause of action which accrued in the State.—*Western Union Telegraph Co. v. Pleasants*... 641
14. *Same; authority of agent, how may be proved.*—To recover damages against a corporation for the loss of a horse, caused by the carelessness of its agent who hired it, express authority to the agent to hire the horse need not be proved; it may be implied, where the evidence will warrant it.—*S. C.*..... 641
15. *Subscription, terms of; acceptance of by corporation; how may be proved.*—The acceptance by the trustees of an incorporated univer-

CORPORATIONS—CONTINUED.

- sity of the terms of a subscription to its endowment fund may be proved by parol testimony.—*Jones v. Trustees Florence Wesleyan University*. 626
16. *Corporations, entries in ; when inadmissible as against third persons.* Entries in the books of a private corporation, relative to any property or right claimed by it, are inadmissible as evidence to establish such rights against third persons.—*S. C.* 626
17. *Subscription ; what sufficient evidence of acceptance of.*—Liability or expense incurred by an educational incorporation on the faith of subscriptions made to its endowment fund, is evidence of its acceptance of the subscription with the terms imposed.—*S. C.* . . . 626
- See, also, BANKS,
COUNTIES,
RAILROADS

COSTS.

1. *Security for, in action by corporation.*—In a suit by a corporation, security for costs under section 2804 of the Revised Code, is sufficiently lodged with the clerk by endorsing or entering it upon the summons or complaint before they are handed to the sheriff to be executed. The facts of this case show that section 2804 of Revised Code was substantially, if not literally, complied with.—*Ex parte Locke* 77
2. *Solicitor's fee ; how taxed when several defendants found guilty.*—On the conviction of several defendants on an indictment for disturbing religious worship, but one solicitor's fee can be taxed against all the defendants found guilty, as a part of the costs.—*Rev. Code, § 4343.*—*Brown v. The State* 148
3. *Failure to pay, in criminal case.*—If a party who pleads guilty of a less offense than charged against him, pays the fine at the term of the court at which he is so found guilty, but fails to pay the costs or to confess judgment for the same with good and sufficient securities as required by the Code, he may be sentenced to hard labor for the county in which the trial is had, for a period of time in proportion to the amount of the fine, or for a period necessary to pay the costs, at forty cents a day.—*Revised Code, §§ 3759, 3760, 4061.*—*Nelson v. The State*. 186
4. *Same.*—Can such a person so convicted be imprisoned to enforce the payment of the costs thus imposed, if he fails to pay them or secure them, as allowed by the statute?—*Const. Ala. 1867, art. 1, § 22.*—*S. C.* 196

COUNTY.

1. *Claims against ; what must be allowed by commissioners court.*—A jury certificate is not such an authenticated claim against the county as may be paid by the county treasurer without the previous allowance of the commissioners court.—*Jackson v. Dinkins*. . . 69
2. *Same ; penalty under act of Dec. 28, 1868, to suppress murder, &c.*

COUNTY—CONTINUED.

- The penalty given against a county by the act entitled "an act to suppress murder, lynching, assaults, and assaults and batteries," approved December 28, 1868, is not a claim required to be presented to the court of county commissioners before suit brought, but must be recovered by an action in the circuit court of the proper county, by summons and complaint against the county.
Dale County v. Gunter..... 118
3. *Act giving penalty and providing special way to recover; must be strictly pursued.*—The act having provided a special way by which such penalty is to be recovered and collected, that way, and no other, must be pursued for that purpose.—*S. C.*..... 118
4. *Outlaw; word as used in section 1 of act of 28th December, 1868, defined.*—The word "outlaw," as employed in the first section of said act, is not to be understood in the sense of that term as used in the English statutes and common law, but is to be understood as referring to the character of person or persons named in the act entitled "an act for the suppression of secret organizations of men disguising themselves for the purpose of committing crimes and outrages," approved December 26, 1868, and who by said act, while under cover of such disguise, and while in the act of committing, or threatening, or attempting to commit, the offenses therein named, are put out of the protection of the law, and may lawfully be shot or killed by any person.—*S. C.*..... 118
5. *Same; outlawry can not be pronounced by an act of the legislature.* Outlawry, legally speaking, is a judicial proceeding, and no one can be outlawed but in such a proceeding, and "by due process of law." An act of the legislature is not "due process of law."—*S. C.* 118
6. *Act of December 28, 1868; the words "in disguise," &c., construed.* A person "in ambush, or concealed in the bushes," is not a person in disguise, within the purview and meaning of the act first above named; and the assassination or murder of a party by a person so ambushed or concealed, does not inflict upon the county the penalty given by the first section of said act, unless said party is so assassinated or murdered "for past or present party affiliation or political opinion."—*S. C.*..... 118
7. *How county may be sued.*—A county is a body corporate in this State, and it may be sued in the same manner that a natural person may be sued, by one who has claims against it, if no other provision is made for their payment.—*Rev. Code, § 2558.—Randolph County v. Hutchins.*..... 397
8. *Same.*—In such a suit, judgment by default may be taken against the county, if the suit is not defended.—*S. C.*..... 397
9. *Same.*—A judgment, thus taken, will not be set aside on appeal to the supreme court, if it is founded on county warrants, issued for claims presented and allowed, for services rendered the county, and a stated account, when the only objection to the judgment, assigned as error, is that the complaint fails to show a sufficient cause of action, and the complaint, though inartificially drawn, shows a sufficient cause of action.—*S. C.*..... 397

COUNTY—CONTINUED.

10. *Judgment by default against county; what service sufficient to authorize.*—A judgment by default against a county, founded upon service of process, which shows that the summons was “executed” by the sheriff, without also showing upon whom the service was made, is not erroneous, for this reason.—*S. C.*..... 397

COURT, CIRCUIT.

1. *Power to amend judgments.*—A mistake in entering a final judgment, whereby the cause is in fact discontinued, may be corrected before the adjournment of the court; but after the end of the term, and the final adjournment of the court, the court ceases to have any power to correct the error; and a motion by the plaintiff, at a subsequent term, to set aside the judgment and reinstate the case on the docket, should be denied.—*Curtis v. Gaines*..... 455
2. *Proceedings at special term.*—The sentence of a circuit court, in a case of felony, rendered at a special term not held on the application of the person charged, nor on account of a failure to hold a regular term, is invalid.—*Overstreet v. The State*..... 30
3. *Proceedings at term not authorized by law.*—An indictment found by a grand jury at a term of court held at a time unauthorized by law, is a nullity, and so are all the proceedings thereon. Such an indictment should be quashed, and after conviction thereon, judgment should be arrested on motion.—*Davis v. The State*..... 80

COURT, COMMISSIONERS.

1. *What claims must be allowed by.*—A jury certificate is not such an authenticated claim against the county as may be paid by the county treasurer without the previous allowance of the commissioners court.—*Jackson v. Dinkins*..... 69
2. *Same.*—The penalty against a county given by the act entitled “An act to suppress murder, lynching, assaults, and assaults and batteries,” approved December 28, 1868, is not a claim required to be presented to the court of county commissioners before suit brought, but must be recovered by an action in the circuit court of the proper county, by summons and complaint against the county. *Dale County v. Gunter*..... 118
3. *Notice of special term.*—The act of the 10th of October, 1866, entitled, “An act to amend an act entitled an act to regulate the publication of legal and other notices in the State of Alabama,” does not repeal section 830 of the Revised Code, and, therefore, a special term of a commissioners court, held by direction of the judge of probate, upon ten days notice, by advertisement in some newspaper in the county, or by posting up at the court-house door and two other public places in the county, notice of the same, is a lawful special term of said court.—*Ex parte Selma and Gulf Railroad Company*..... 230
4. *Proposal of railroad company to commissioners court; may be made to a special term.*—A proposal of a railroad company, under the act

COURT, COMMISSIONERS—CONTINUED.

- entitled "An act to authorize the several counties, and towns, and cities of the State of Alabama, to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their respective interests," approved 31st December, 1868, if it conform to the provisions of said act, may be made to a special term of a court of county commissioners, and such proposal will give said court jurisdiction to make an order to submit said proposal to the qualified electors of said county for their acceptance or rejection; and an election duly held under such order, if it result in favor of subscription, will authorize said court to subscribe, on behalf of such county, to the capital stock of said railroad company, and to issue the bonds of such county in payment of the same.—*S. C.*..... 230
5. *Mandamus*; when will be granted to compel subscription, &c.; what proposition gives court no jurisdiction to order election, &c.—If said court, after such election, if in favor of subscription, refuses to subscribe for the amount of stock named in such proposal, and issue the bonds of the county in payment of the same, it may be compelled to do so by *mandamus*; but if said proposal contains another proposition in addition, as to build a passenger and wagon bridge across a river running through said county, free of toll to all the people of the State, such proposal, containing such an additional proposition, will confer on said court no jurisdiction to submit such proposal to the qualified electors of the county for their acceptance or rejection, and an order of said court, and an election held under it, will be invalid, and will give to said court no authority to subscribe to the capital stock of said railroad company, and issue the bonds of the said county in payment of the same.—*S. C.*..... 230
6. *Same.*—An application for a *mandamus*, in such a case, to compel a court of county commissioners to subscribe to the capital stock of a railroad company, and pay for the same in the bonds of the county, will be denied.—*S. C.*..... 230
7. *Certiorari*; when does not lie.—A *certiorari* will not be granted at the instance of an individual tax-payer, and in his name, to revise the proceedings of the court of county commissioners appointing an agent "for the issuing of the rations to the indigent persons of the county," and ordering his payment out of the county treasury. *Benton v. Taylor.*..... 388

COURT, PROBATE.

1. *Power to re-state accounts during same term.*—The court of probate may recall and re-state the account of a guardian, once allowed and passed, during the same term at which it was so passed. The court's power over such a proceeding does not end until the court is adjourned without day for the term.—*Vaughan and Wife v. Bibb.* 153
2. *Rules of evidence in.*—The same rules of evidence govern in trials

COURT, PROBATE—CONTINUED.

- of contested wills as in courts of common law. Interest does not disqualify a legatee from testifying.—*Barker v. Bell*..... 217
3. *Order made at special term.*—An order of the probate court removing an executor, made at a special term to which the cause was not adjourned or appointed, is void.—*Boynton v. Nelson*..... 501
4. *Order of sale made in 1861 ; only prima facie good.*—An order for the sale of a decedent's lands, for distribution among his heirs, made by a probate court in this State, in the year 1861, is only *prima facie*, and not conclusive.—*McSwean v. Faulks*..... 610

CRIMINAL LAW.

ARSON.

1. *Ownership of property must be proved as laid.*—The forms of indictment found in the Code are prescribed by law. And on a charge of arson, where they allege an ownership of the house set fire to or burned, the ownership must be proved as charged in the indictment.—*Boles v. The State*..... 204
2. *Sufficiency of proof.*—An indictment for arson in burning a gin-house is sustained by proof that it was burned by the ignition of matches which the defendant put amidst the unginned cotton in the gin-house, with the intention of having the house burned by the ignition of the matches in the necessary or probable handling of the cotton.—*Overstreet v. The State*..... 30

ASSAULT WITH INTENT TO MURDER.

3. *What must be proved, as to words of encouragement, &c., to parties committing assault, &c.*—On the trial of a party indicted for an assault with intent to murder, if it appears the assault was, in fact, made by a mob, and not by the defendant, and he is sought to be convicted by proving that he encouraged, aided and abetted the mob to commit the assault, by words uttered by him, it must be shown that they were addressed to, or at least heard by, the persons, or some of them, composing the mob.—*Cabbell v. The State*.. 195
4. *When words not sufficient to make out offense.*—If the words were not addressed to, or heard by, the persons, or some of them, constituting the mob, then they are not of themselves evidence of any combination or common design between the defendant and the mob.—*S. C.*..... 195
5. *Particular intent must be proved.*—On the trial under such an indictment, the State must prove the particular intent charged in the indictment.—*S. C.*..... 195
6. *Accountability of defendant and effect of words of encouragement to mob ; what not destroyed by.*—The legal effect of words of encouragement addressed to a mob, whatever it be, can not be destroyed by the after repentance of the speaker.—*S. C.*..... 195

BAIL.—See that Title.

CRIMINAL LAW—CONTINUED.

CARRYING CONCEALED WEAPONS.

7. *Pistol, what is not within meaning of statute.*—A pistol that has no mainspring or other necessary parts of a lock, and can only be fired off by the use of a match, or in some other such way, is not a pistol within the purview and meaning of the statute prohibiting the carrying of concealed weapons, and no person should be indicted and punished for carrying such a pistol.—*Evins v. The State.* 88

CHARACTER.

8. *General good character ; must refer to time before commission of offense*—In a criminal case, evidence of general good character must have reference to a time before, and not after the act or acts complained of were committed ; and when the defendant has voluntarily put his character in issue by introducing evidence of his general good character, the State, even on cross-examination, can not inquire into the defendant's character subsequent to the time the offense was committed.—*Brown v. The State.*..... 175

COSTS.—*See that Title.*

DISTURBING RELIGIOUS WORSHIP.

9. *Constituents of offense.*—To constitute an offense under section 3612 of the Revised Code for disturbing religious worship, there must be not only an actual interruption or disturbance of an assemblage of people met for religious worship, by noise, profane discourse, rude or indecent behavior, or by some other act or acts of like character, at or near the place of worship ; but such interruption or disturbance must also be *willfully* made by the person or persons accused. The intent of the parties is of the very essence of the offense, and to be *willful* it must be something more than mischievous ; it must be in its character vicious and immoral. *Brown v. The State.*..... 175
10. *Same ; meaning of the word "interrupt."*—A charge given by the court, of its own motion, that "the word 'interrupt,' as used in the statute under which the defendants are indicted, means anything done by the defendants, or any other persons, which takes the attention of the hearers away from the services, or discourse of the minister," is erroneous. The meaning of the word "interrupt," as here given, is too general and inapplicable, and the tendency of the charge was to mislead the jury.—*S. C.*..... 175
11. *Same ; charge to jury.*—A charge that instructs the jury that "although the evidence might fail to show that all the defendants engaged in a conversation in the church-yard, so near as to create an interruption or disturbance of a portion of the assemblage of people in the house, yet if they stood by, thus encouraging others, by their presence, to talk, that such would be as guilty as though they had engaged in the conversation themselves," is an improper charge, and calculated to mislead the jury, as it does not require

CRIMINAL LAW—CONTINUED.

- it to be shown that there existed any combination, or common purpose, to make an interruption or disturbance.—*S. C.*..... 175
12. *Same; same.*—A charge that instructs the jury that “they must believe from the evidence, beyond all reasonable doubt, that there was a *willful* interruption or disturbance of a congregation of people met together for religious worship; and that they must also believe from the evidence, beyond all reasonable doubt, that such disturbance was caused by noise, profane discourse, rude or indecent behavior, or some other improper act, at or near the place of worship, intentionally performed by the defendants, before they can find them guilty; and if the jury believe that such act or acts were performed heedlessly or recklessly, that is, carelessly, or without thinking of the probable consequences of such act or acts, then the jury should return a verdict of not guilty,”—states the law correctly, and to refuse to give it, when asked in writing, is an error for which the judgment will be reversed.—*S. C.* 175

EVIDENCE.

13. *Motive to commit crime; when evidence of admissible.*—Evidence of a motive to commit the offense charged, though weak and inconclusive, is admissible where the commission of the crime is shown and the circumstances point to the accused as the guilty agent.—*Overstreet v. The State.*..... 30
14. *Escape of accused during trial, when may be given in evidence.*—The escape of the accused from custody during a criminal trial is evidence of guilt, which may be given in evidence against him on a second trial upon the same indictment and for the same charge, when it appears that there was no other reason for the escape than a fear of conviction on the first trial. But such evidence is not conclusive.—*Murrell v. The State.*..... 89

FINES.

15. *When must be fixed by jury.*—A party who is prosecuted for an assault with intent to murder, by indictment, in the circuit court, and who confesses himself guilty of an assault and battery with a pistol, must have “the amount of the fine” “fixed and determined by a jury.” The fine can not be fixed by the court in such a case. *Nelson v. The State.*..... 186

INDICTMENT.

16. *Amendment of; when not permissible.*—The amendment of an indictment, without the consent of the accused, and against his objections, even in an immaterial particular, is an unsafe practice, and a reversible error.—*Johnson v. The State.*..... 212
17. *Same.*—To permit an indictment to be amended, on motion of solicitor, even in an immaterial matter, without the consent of the defendant, and against his objection, is an error for which the judgment will be reversed.—*Gregory v. The State.*.... 151

CRIMINAL LAW—CONTINUED.

18. *Right of accused to copy of.*—The judgment and sentence in a capital case will not be reversed because the record and proceedings do not show that the defendant was served with a copy of the indictment and a list of the jurors summoned for his trial, including the regular jury, at least one entire day before the day appointed for his trial, unless it appears from the record that the defendant was in actual confinement.—*Robinson v. The State*. 9
19. *Same.*—The omission of the record to show service of a copy of the indictment and a list of the jurors summoned for his trial, upon the defendant, as required by law, when he is in actual confinement, is a reversible error.—*Flanagan v. The State*. 703
20. *Validity, when found at special term.*—An indictment found by a grand jury at a term of court held at a time unauthorized by law, is a nullity, and so are all the proceedings thereon. Such an indictment should be quashed, and after conviction thereon, judgment should be arrested on motion.—*Davis v. The State*. 80
21. *Sufficiency of, for larceny.*—An indictment for stealing “any horse, mare, gelding, colt, filly, or mule,” is sufficient, without alleging the value of the animal taken.—Rev. Code, § 3706.—*Maynard v. The State*. 85
22. *Same.*—Such indictment is not bad, though it may consist of two counts, each of which charges a grand larceny, which is visited with the same punishment.—*S. C.* 85
23. *When necessary for trial of misdemeanors transferred from county court to circuit court.*—Where a defendant, charged with a misdemeanor before the county court, demands a trial by jury, he is entitled to have the trial of the case transferred to the circuit or city court, and can then only be tried by indictment.—*Clark v. The State*. 311
24. *Form given in the Revised Code sufficient.*—An indictment in the form prescribed by the Revised Code sufficiently shows a prosecution carried on in the name and by the authority of the State.—*Johnson v. The State*. 212

LARCENY.

25. *Sufficiency of indictment.*—An indictment for stealing “any horse, mare, gelding, colt, filly, or mule,” is sufficient, without alleging the value of the animal taken.—Rev. Code, § 3706.—*Maynard v. The State*. 85
26. *Same.*—Such indictment is not bad, though it may consist of two counts, each of which charges a grand larceny, which is visited with the same punishment.—*S. C.* 85
27. *Charge to jury as to recent possession.*—A charge to the jury in a prosecution for horse stealing, that the recent possession by the accused of the property taken, unexplained, is evidence of guilt, is not erroneous, but is a proper exposition of the law.—*S. C.* 85
28. *Stolen property, possession of; by whom can not be explained.*—Such possession by the accused can not be explained by proof in-

CRIMINAL LAW—CONTINUED.

- roduced by the accused of the declarations made by him showing how he came in possession of the property stolen. This would make him a witness in his own favor, which is not permitted. Rev. Code, § 2704.—*S. C.*..... 85
29. *Indictment; on what defendant can not be convicted of larceny.* On an indictment for breaking and entering a dwelling house *with intent to steal*, the defendant can not be convicted of larceny. *Fisher v. The State.*..... 717
30. *Same; what proceedings do not put defendant in jeopardy.*—If on the trial of the defendant under such an indictment, the jury return a verdict of guilty, for grand larceny, the verdict is a nullity, and no judgment can be entered upon it, and the defendant may be indicted for the larceny, notwithstanding said verdict; and a plea, in the nature of a plea of *autrefois convict*, based on said verdict, to an indictment for the larceny, is bad on demurrer. The defendant was not, in legal contemplation, put in jeopardy by said verdict.—*S. C.*..... 717
31. *Plea of not guilty; error to proceed to trial without.*—After a demurrer to such a plea is sustained, it is error to proceed with the trial without a plea of not guilty, pleaded by the defendant, or entered for him by the court.—*S. C.*..... 717
32. *Possession of stolen property, charge to jury as to; what charge should be given.*—If the evidence against the defendant on the trial is, that a watch, charged to have been stolen, was in his possession shortly after the larceny was committed, it is error on the part of the court to refuse to charge the jury, on the defendant's request, that "the mere possession of the watch is not conclusive evidence that he stole it," for which the judgment will be reversed, on appeal.—*S. C.*..... 717

LOTTERIES.

33. *The "Mutual Aid Association," act creating; what it authorizes.* The act of the general assembly of this State, approved December 10, 1868, creating the Mutual Aid Association, authorizes said association to set up and carry on a lottery such as is sanctioned by said act, and for the purposes therein named.—*Pamph. Acts 1870-71, p. 217.—Boyd & Jackson v. The State.*..... 329
34. *Privilege granted by act of the legislature, when not taken away.* Said act confers upon the partners in said association, after the payment of the sum of \$2,000 into the State treasury, as required by the fourth section thereof, the privilege of setting up and carrying on a lottery, such as is authorized by said act, for one year, and a repeal of the act granting this privilege can not take it away during the time for which the payment has been made.—*S. C.*..... 329
35. *"No one is permitted to take advantage of his own wrong;" to whom applies.*—The first head-note in *Brent v. The State*, (43 Ala. 227,) repeated and affirmed; that "the State as well as an individual is bound by the maxim, that no one is permitted to take advantage of his own wrong.—*S. C.*..... 329

CRIMINAL LAW—CONTINUED.

36. *Protection afforded by the charter of the Tuskaloosa Scientific and Art Association ; what not erroneous.*—On the trial of a person indicted for carrying on a lottery without legislative authority, a charge that the use of printed or written refusals of the article drawn, and demands for the payment of their value in money, in pretended compliance with the charter of the Tuskaloosa Scientific and Art Association, but in real evasion of the law, will not give the defendant the protection of that charter, is correct.—*Warner v. The State* 549

MANSLAUGHTER AND MURDER.

37. *Provocation to reduce voluntary homicide to manslaughter ; what should be nature of.*—The provocation which should have the effect to reduce voluntary homicide to the degree of manslaughter must be so apparent as to justify the assumption of its reality. It must also be sudden and sufficiently great, and calculated to exasperate, both in its character and in respect to the person against whom it is directed.—*Flanagan v. The State*..... 703
38. *Malice ; province of jury to ascertain existence and degree of.* Malice being the test and gauge of the character of voluntary homicide, it is the province of the jury to ascertain its existence and degree.—*S. C.*..... 703
39. *Proof of motive.*—Any fact which tends to show the real motive of the accused in killing the deceased is relevant evidence, whether offered in prosecution or defense.—*S. C.*..... 703
40. *Charge to jury ; what erroneous.*—Charges which present the erroneous and unreasonable belief of the accused respecting certain alleged provocation of the deceased, and the accused's transport of rage in consequence, as reasons why he should be acquitted, without any defense or evidence of insanity, are properly refused. *S. C.*..... 703

PRACTICE.

41. *Trial for indictable offense, can not be had without presence of prisoner.*—No person indicted for a criminal offense, whether it be for a felony or a misdemeanor, can be tried without being personally present in court, and a judgment rendered upon a conviction obtained in his absence, if for a fine only, is erroneous, and will be reversed on appeal.—*Slocovitch v. The State*..... 227
42. *Accused, duty of ; as to errors relied on to reverse judgment below.* Although under our statutes no assignment of error is necessary in a criminal case ; nevertheless, the accused should, in some proper manner, bring to the notice of the court the matters relied on to reverse the judgment below.—*Robinson v. The State*..... 9

RETAILING SPIRITUOUS LIQUORS.

43. *Section 3618 of the Code not repealed by revenue law of 1868.*—Section 3618 of the Revised Code, which forbids the sale of spirituous

CRIMINAL LAW.—CONTINUED.

- liquors without a license, is a criminal and not a revenue law, and is not repealed by the revenue law of 1868.—*Campbell v. The State*. 116
 Also, *Lillensteine v. The State*..... 498
44. *Wholesale liquor dealer; when becomes retailer*.—Under the revenue law of 1867, a licensed wholesale dealer in spirituous liquors, &c., becomes a retail dealer if he sells in less quantities than a quart, or suffers larger quantities, sold or disposed of by him, to be drank on his premises.—Section 112, subdivisions 4, 5.—*Lillensteine v. The State*..... 498
45. *Carrying on business of retailer; what does not constitute*.—An indictment under section 111 of the revenue act of 1868, for being engaged in or carrying on the business of a retailer in spirituous liquors, &c., without license, is not sustained by evidence of a single sale of three pints of whiskey by the defendant, who was a farmer and carpenter, without proof also of intention.—*Bryant v. The State*..... 302
46. *Retailing near Fort Browder Academy, in violation of its charter*. On an indictment under section 2 of the act entitled "An act to incorporate the Fort Browder male academy, in Barbour county," approved February 8, 1858, for selling spirituous liquors or wines within half a mile of said academy, except for medical purposes, it can not be collaterally shown, as a defense, that the charter granted by said act has been forfeited by *non-user*, or otherwise.—*Hudgins v. The State*..... 208
47. *General license; what not defense to*.—Nor is a general license to retail spirituous liquors, &c., issued by the probate judge, any defense to such an indictment.—*S. C.*..... 208

VERDICT AND JUDGMENT.

48. *Court, sentence of, in felony case; when void*.—The sentence of a circuit court, in a case of felony, rendered at a special term not held on the application of the person charged, nor on account of a failure to hold a regular term, is invalid.—*Overstreet v. The State*. 30
49. *Judgment on failure to pay fine*.—If a person pleads guilty of a less offense than charged, and pays the fine at the term of the court at which he is so found guilty, but fails to pay the costs or to confess judgment for the same with good and sufficient securities as required by the Code, he may be sentenced to hard labor for the county in which the trial is had, for a period of time in proportion to the amount of the fine, or for a period necessary to pay the costs, at forty cents a day.—Revised Code, §§ 3759, 3760, 4061.—*Nelson v. The State*..... 186
50. *Quere*.—Can such a person so convicted be imprisoned to enforce the payment of the costs thus imposed, if he fails to pay them or secure them, as allowed by the statute?—Const. Ala. 1867, art. 1, § 22.—*S. C.*..... 186

DAMAGES.

1. *For breach of contract.*—W., representing to the wife of M. that he had agreed with her husband for the purchase of his land, received from her the possession, and gave her, as part of the consideration, certain notes of her husband, founded upon valuable consideration, and the value of the rent of another place to which she removed, all of which he procured with Confederate currency. M., repudiating the transaction as a sale of his land, but acknowledging the benefit that accrued to him by having his notes taken up, adjusted the matter with W., by agreeing to pay him a specified sum in Confederate currency, less the rent of his own land during W.'s possession of it.—*Held*, that, in a suit by W. on this agreement, the measure of recovery is the value, at the time of the contract, the true and legal consideration for which the specified sum in Confederate currency was agreed to be paid, less the rent due the defendant.—*Whitley v. Moseley* 480
2. *For conversion of promissory note.*—In trover for a promissory note, the measure of damages is, *prima facie*, the value on its face. But the insolvency of the parties liable thereon may be shown in mitigation of damages.—*McPeters v. Phillips* 496
3. *For breach of contract dischargeable by payment of Confederate money.*—In estimating the damages on a contract for payment of a sum of money in Confederate currency or treasury-notes, the true criterion is the value of the property sold, in lawful money, at the date of the sale, and not the value of the Confederate currency at the time the debt becomes due.—*Wharton v. Cunningham* 590
4. *Assessment of damages for lands taken by railroad company.*—The 5th section of the act to amend the charter of the Alabama & Florida Railroad Company, directs how the damages shall be assessed for lands condemned for the use of said company, and this section requires the jury making such assessment to take into consideration the probable advantages the owner of the lands condemned may derive from the construction of the road, in increasing the value of his lands.—Acts 1853-4, p. 258, § 5. The principles enunciated in the 3d and 4th head-notes of *Alabama & Florida Railroad Company v. Burkett*, (42 Ala. p. 83,) modified.—*Ala. & Fla. Railroad Co. v. Burkett* 569
5. *Same; what consideration can not enter into the assessment of damages.*—But in making such assessment the jury can not take into consideration the possible damages that may arise from the killing of stock by the cars on said railroad, or the possible necessity of an increase in the quantity of fencing on said land. Such damages would be too remote, as they might never occur.—*S. C.* 469

DEEDS.

1. *Deed by one of non-sane mind void.*—A deed made by a party of non-sane mind, to such a degree as to incapacitate him for making contracts, is void, and his heirs may file a bill in chancery to set it aside.—*Kennedy v. Marrast*, 161

DEEDS—CONTINUED.

2. *Conveyance by husband to wife*.—The deed of a husband, made in this State since the adoption of the Code of Alabama, to the wife, on a valuable consideration paid by her to him, by which he conveys to her his interest in a steamboat and its equipments in this State, if free from fraud, is not void. Such a deed, if voidable, can only be avoided by the parties to it, or their creditors, and not by a stranger.—*Stone & Matthews v. Gazzam*. 269
3. *Reformation in chancery; lost deeds*.—A court of chancery has ample jurisdiction to reform deeds and other written instruments, on the ground of mistake, even upon parol evidence, where no statutory provision intervenes to prevent it; and where a conveyance of lands has been accidentally lost or destroyed, so that the purchaser is, thereby, unable to show a good title, the vendor may be required to make the purchaser another deed.—*Hudspeth v. Thomason*. 470
4. *Same; what no defense to*.—On a bill, by a vendee, to correct a mistake in the description of the land bought, it is no defense that the vendor was paid in Confederate treasury-notes, if voluntarily received by him, where the vendee is chargeable with no deceit or fraud on his part.—*S. C.* 470
5. *Recording decree in chancery; effect of*.—Recording a decree of the chancery court vesting title to real property, under the statute (Clay's Dig. p. 354, § 57,) was not necessary to its validity, but was notice of its contents, as the record of a deed under the registration laws.—*Dudley v. Witter*. 664

DETINUE.

1. *Failure of jury to assess value of articles separately*.—In an action under chapter 5 of Revised Code, page 520, for the recovery of personal property in specie, if the property has been delivered to the plaintiff by the sheriff, and consists of many articles of household furniture, and a large number of the articles are of inconsiderable value, and the jury on the trial find for the defendant and assess the value of the articles in gross, and the plaintiff makes no objection to the verdict, because of the failure to assess the articles separately, he will be held to have acquiesced in the verdict, and will not be heard to complain of the irregularity for the first time in this court.—*Eslava v. Dillikunt*. 698
2. *Same; what presumption will be entertained to uphold verdict*.—In such a case, unless the contrary appears, it should be presumed in favor of the verdict, that the parties introduced no evidence on the trial, as to the separate value of said articles; and consequently under section 2595 of the Revised Code, it was lawful for the jury to assess the value of said articles in gross, as without such evidence it was impracticable to assess the value of each article separately.—*S. C.* 698

DISCONTINUANCE.

1. *What constitutes.*—In a joint action on a promissory note against three parties, if the summons is executed on two of the defendants, and returned not found as to the third ; and, in that posture of the case, the plaintiff continues the cause as to the defendant not found, and takes a judgment against the other two, the entire case is thereby discontinued.—*Curtis v. Gaines*..... 455
2. *How corrected.*—Such a mistake may be corrected before the adjournment of the court ; but after the end of the term, and the final adjournment of the court, the court ceases to have any power to correct the error ; and a motion by the plaintiff, at a subsequent term, to set aside the judgment and reinstate the case on the docket, should be denied.—*S. C.*..... 455
3. *Effect of.*—A discontinuance puts an end to a case. The parties are thereby out of court, and the plaintiff must begin *de novo*.
S. C...... 455

DOWER.

1. *Jurisdiction of chancery over.*—The chancery courts of this State have original jurisdiction to entertain suits for dower concurrent with the courts of law, especially where there is a purchaser under execution title in possession of the lands at the death of the husband, and there is necessity for an account for mean profits, by way of damages, between the tenant of the lands and the claimant of the dower interest.—*Irvine v. Armistead*..... 363
2. *When not defeated by lien of judgment.*—A judgment of a circuit court, rendered on the 10th day of September, 1861, on which an execution was issued within the year after its rendition and returned unsatisfied, and upon which judgment no other execution was issued until September, 1865, is not a lien on the lands of a defendant in said judgment, which will defeat his widow's right of dower in his dowerable lands, when the marriage with such defendant took place on the 29th day of November, 1862, and after the rendition of such judgment.—*S. C.*..... 363
3. *What no bar to right of dower.*—A sale of such defendant's dowerable lands under execution on such judgment, and the conveyance of the same to the execution purchaser by the sheriff in 1866, is no bar to the widow's dower.—*S. C.*..... 363
4. *Purchaser at execution sale under such judgment ; for what is liable.* The purchaser under such sale, or his administrator, is liable, if he resists the widow's application for dower in such lands, to account to her for the mean profits of such dower lands from the death of the husband, by way of damages, during the tenancy of the same.
S. C...... 363
5. *Widow's quarantine.*—The widow's quarantine, as given by section 1630 of the Revised Code, pertains exclusively to property of which she is dowerable.—*Pizzala v. Campbell*..... 35

ERROR AND APPEAL.

WHEN APPEAL LIES.

1. *From chancery decree.*—An appeal can not be taken from an order of the chancery court sustaining a demurrer to a cross-bill, filed by way of an answer to the original bill, and dismissing such cross-bill, before the final determination of the cause.—*Thornton v. Kyle.* 379
2. *Same.*—Such a case does not fall within the relief of the section of the Revised Code allowing appeals from certain interlocutory judgments and decrees, before the final determination of the cause.
S. C. 379
3. *Appeal, right of being lost; how can not be restored.*—A party who has lost his right of appeal, though without fault or neglect on his part, can not restore it through the mere instrumentality of a motion to set aside the judgment complained of, which is overruled. His remedy, where he shows a case for relief, is by *certiorari*, the grant of which is discretionary.—*Boynton v. Nelson* 501

PRACTICE.

4. *Case struck from docket, for want of jurisdiction.*—Where the transcript of the record and proceedings of the lower court were filed in the supreme court, it no where appearing, either in the record or clerk's certificate, that an appeal had been taken, there being no appeal bond or security for costs of the appeal, the supreme court ordered the case stricken from the docket, as one of which it has no jurisdiction.—*Brigman v. The State.* 72
5. *Assignment of errors in criminal case.*—Although, under our statutes, no assignment of error is necessary in a criminal case; nevertheless, the accused should, in some proper manner, bring to the notice of the court the matters relied on to reverse the judgment below.—*Robinson v. The State* 9
6. *Error without injury in charge of court on effect of evidence.*—A charge on the effect of the evidence should not be given, unless at the request of one of the parties; but when it is clear that no injury has resulted, the judgment will not be reversed.—*Dugger v. Tayloe.* 320
7. *Error without injury; what no ground for reversal.*—A charge of the court which is more favorable to the defendant objecting to it than the testimony justifies, is, at most, but error without injury, and is not a ground for reversal.—*Wilcoxon v. Reynolds.* 529
8. *Same; party complaining must show error.*—When a charge is of such doubtful meaning as to leave it uncertain whether it would produce a correct result or not, the party objecting to it must show that he would be injured by it. Any process that will reach a correct result will be sufficient.—*S. C.* 529
9. *What objection can not be made for first time in the supreme court.* The objection that the complainant is administrator only by appointment of a court of the Confederate States, can not be made for the first time in this court.—*Costley v. Towles.* 660
10. *Waiver of irregularities.*—Mere irregularities may be waived by

ERROR AND APPEAL--CONTINUED.

- a subsequent step taken in a cause, but substantial errors will not be. If a plaintiff, against the objection of the defendants, improperly obtains an order of the court setting aside a final judgment obtained by him at a previous term, and re-instating the cause on the docket, the appearance of the defendants, on a trial afterwards had, will not be a waiver of the error.—*Curtis v. Gaines*. 455
11. *Reversal of probate decree*.—A decree of the probate court on the facts of a case, will not be reversed when the evidence on either side is pretty evenly balanced.—*Hightower v. Moore*. 387
12. *Reversal of chancery decree on facts*.—A decree of the chancery court on the facts of a case, will not be reversed unless decidedly contrary to the weight of evidence.—*Marshall v. Howell*. 318
13. *Same*.—When the decree of the chancellor is not opposed to the evidence on which it is based, it will not be reversed because the evidence which supports it is weak and suspicious. Before such a decree is disturbed, there must be a strong preponderance of the evidence against it.—*Kennedy v. Marrast*. 161

JUDGMENT.

14. *When corrected and affirmed*.—A judgment in the court below in favor of the moveant in the court below, "or his attorneys of record [naming them]," will be corrected in this court, when the verdict in the court below was in favor of the moveant and the attorneys were not parties to the suit, by arresting that part ordering payment to the attorneys of record, and the judgment as thus corrected affirmed.—*Webb v. Edwards*. 18
15. *Final decree on reversal, when will not be rendered by supreme court*. A decree will not be rendered here, when it is possible that a different result, more favorable to justice, might be obtained by remanding the cause.—*Latham v. Staples*. 462

ESTATES OF DECEDENTS.

1. *Property exempted from administration ; when may be sold by administrator*.—The property of a decedent exempted from administration by section 2061, Revised Code, may be sold by the administrator for the benefit of the family, if not needed for their use. But if he sell it without the consent of the family, he is liable for its conversion.—*Barwick v. Rackley*. 402
2. *Same ; when widow is estopped from suing for*.—The consent of the widow to the sale of such property, in consideration of an invalid agreement with the administrator, is no consent. But a sale at her request estops her from suing for the conversion.—*S. C.*. 402
3. *Same ; power of widow to sell*.—The widow, when she is the head of the family, may sell such property ; and if the family is to be dispersed she may sell her interest in it without regard to whether it has been set apart or not.—*S. C.*. 402
4. *Same ; when guardian liable for conversion of*.—The guardian of an infant member of the family is liable for a conversion, if he sells

ESTATES OF DECEDENTS.—CONTINUED.

- the child's interest in the property. *Secus*, if the child be withdrawn from the family.— *S. C.* 402
5. *Inventory, &c., of administrator ; when not inadmissible as evidence.* The inventory and sale bills of an administrator are not inadmissible as evidence, because they were made during the late civil war. *S. C.* 402
6. *Sale of perishable property.*—It is not indispensable that an application for the sale of property of an estate, because it is liable to waste or of a perishable nature, should be in writing and be verified by affidavit. But for the sake of order and precision, such an application should always be in writing, and be verified by affidavit.—*Adkinson v. Wright* 598
7. *Same ; order of sale, when not void.*—Where the record shows that application was made, and that the court was satisfied by proof that the property was of the perishable nature alleged, and its sale would be beneficial to the estate, the sale is not void.—*S. C.* 598
8. *Order of sale made in 1861 ; only prima facie good.*—An order for the sale of a decedent's lands, for distribution among his heirs, made by a probate court in this State, in the year 1861, is only *prima facie*, and not conclusive.—*McSweeney v. Faulks* 610
9. *Same, for what causes such sale may be set aside.*—A sale under such an order, made in the year 1863, may be vacated and set aside on motion, founded on the petition of the parties complaining, who are distributees of said estate, made in the court of probate wherein the record of the first order and sale are found, if it appear that such sale has never been confirmed, and the purchaser at such sale has failed to give the security for the purchase-money required by law, and is dead at the date of said motion.—*S. C.* 610
10. *Widow's quarantine.*—The widow's quarantine, as given by section 1630 of the Revised Code, pertains exclusively to property of which she is dowable.—*Pizzala v. Campbell* 35
11. *Leasehold ; widow not entitled to rents and profits of.*—A leasehold is not such an estate as the widow of the lessee is entitled to retain the rents and profits of, by Art. 14, § 5 of the State constitution. *S. C.* 35
12. *Sale of land by decree of probate court ; for what purpose parol evidence inadmissible.*—In an action for the recovery of land brought by the heirs of a decedent against a purchaser at a sale under an order of the probate court, parol evidence is inadmissible to prove the non-payment of the purchase-money, after a conveyance has been made by order of the court on the application of the purchaser under § 2096, Revised Code.—*Dugger v. Tayloe* 320
13. *Annual settlement ; prima facie correct.*—An annual settlement of an estate is to be taken as *prima facie* correct on final settlement. *Scruggs & Lindsay v. Orme* 533
14. *Presumption of final settlement of estate after lapse of twenty years ; by what avoided.*—The presumption of the final settlement and distribution of an estate, after the lapse of twenty years, is avoided, in favor of a distributee, by proof of an annual set-

ERROR AND APPEAL—CONTINUED.

- tlement within the time, and the absence of the administrator from the State a sufficient length of time during the period within which he might have been called to account.—*S. C.*..... 533
15. *Decree of final settlement; when may be annulled.*—The court of probate may set aside a judgment or decree made therein on the final settlement of an administration, where it appears from the record that the court acted without jurisdiction of the parties or the subject matter.—*Petty v. Britt's Legatees*..... 491
16. *Same; what necessary when minors are interested.*—The court of probate can not proceed in the final settlement of an administration where the record shows that there are minor distributees, without appointing a guardian *ad litem* to represent the minors and his acceptance of such appointment, if there is no general guardian. *S. C.*..... 491
17. *Same.*—A decree of the court of probate on the final settlement of an estate by an administrator, when there are minors, who are unrepresented by a guardian *ad litem*, will be set aside as void on motion of the distributees.—*S. C.*..... 491
18. *Review of final settlement in chancery.*—Section 2274, Revised Code, seems to authorize a review in the chancery court of the final settlement of a decedent's estate in the probate court, upon specified errors positively charged, little short of the privilege and right of appeal.—*Meadows v. Edwards & Brassell*..... 354
19. *Bill by minors to correct errors in final settlement; when not without equity.*—When, in such settlement, a decree has been rendered in favor of the administrator, a bill filed by minor distributees, alleging that they were represented only by a guardian *ad litem*, and specifying errors equal in amount to the decree, is not without equity.—*S. C.*..... 354
20. *Final settlement of administrator in chief, sufficient to support bill to correct errors.*—The final settlement of the administrator in chief, is sufficient to support the bill, although an administration *de bonis non* is pending. The distributees are parties in interest, unless the estate is declared insolvent, and may be so afterwards.—*S. C.*..... 354
- See, also, EXECUTORS AND ADMINISTRATORS.

ESTOPPEL.

See CORPORATIONS, 10, 11.

ESTATES OF DECEDENTS, 2.

EVIDENCE.

ADMISSIBILITY AND RELEVANCY.

1. *Evidence must be relevant to issue.*—The evidence must be relevant to the issues, or some one of them. It must tend to prove the facts alleged in the pleas. Evidence by one of the parties to a contract, that a sum of money mentioned therein was *understood* by one

EVIDENCE—CONTINUED.

- only of the parties to the contract that it should be discharged by a payment in Confederate currency or treasury-notes, will not be competent under the issue on a plea that it was understood and agreed by *both* the parties to the contract that it might be discharged by a payment in Confederate currency or treasury-notes.--*Wharton v. Cunningham*..... 590
2. *Character in criminal case*.—In a criminal case, evidence of general good character must have reference to a time before, and not after the act or acts complained of were committed; and when the defendant has voluntarily put his character in issue by introducing evidence of his general good character, the State, even on cross-examination, can not inquire into the defendant's character subsequent to the time the offense was committed.—*Brown v. The State* 175
3. *Motive to commit crime*.—Evidence of a motive to commit the offense charged, though weak and inconclusive, is admissible where the commission of the crime is shown and the circumstances point to the accused as the guilty agent.—*Overstreet v. The State*. . . 30
4. *Same*.—Any fact which tends to show the real motive of the accused in killing the deceased is relevant evidence, whether offered in prosecution or defense.—*Flanagan v. The State*..... 703
5. *Unstamped agreement*.—A written agreement, the foundation of an action for damages, made in the year 1863, and unstamped, is inadmissible as evidence.—*Mobile & Ohio Railroad v. Edwards*..... 267
6. *Inventory, &c., of administrator; when not inadmissible as evidence*. The inventory and sale bills of an administrator are not inadmissible as evidence, because they were made during the late civil war. *Barwick v. Rackley*..... 402
7. *Written contracts sued on*.—Section 2682 of the Revised Code applies to written instruments, the foundation of the suit, purporting to be made by a corporation defendant, its agent or attorney, in like manner as it applies to instruments purporting to be made by natural persons, &c., and must be received in evidence without proof of the execution, unless the execution thereof is denied by plea verified by affidavit.—*Oxford Iron Co. v. Spradley*..... 93

ADMISSIONS AND DECLARATIONS.

8. *Admission of record*.—Where the defendant is sued as a corporation aggregate, the appointment of an attorney, and an appearance entered by him, is an admission of record of the corporate character of the defendant.—*Oxford Iron Co. v. Spradley*.... 98
9. *Escape of accused during trial, when may be given in evidence*.—The escape of the accused from custody during a criminal trial is evidence of guilt, which may be given in evidence against him on a second trial upon the same indictment and for the same charge, when it appears that there was no other reason for the escape than a fear of conviction on the first trial. But such evidence is not conclusive.—*Murrell v. The State*..... 89

EVIDENCE—CONTINUED.

10. *Declarations of accused, in his own favor.*—The recent possession of the stolen property by the accused, in a prosecution for larceny, is evidence of guilt, if unexplained; and can not be explained, in his favor, by his own declarations as to the manner in which he acquired such possession.—*Maynard v. The State*..... 85
11. *Books of private corporations.*—The competency as evidence of the books of a private corporation is not destroyed because they had been for some time in the possession of the attorneys of the corporation, who brought them into court and delivered them to the attorneys of the opposite party, for use as evidence in the pending trial, there being no suspicion or claim of fraud on their part. *McCullough v. Talladega Ins. Co*..... 376
12. *Same; when entries are inadmissible against third persons.*—Entries in the books of a private corporation, relative to any property or right claimed by it, are inadmissible as evidence to establish such rights against third persons.—*Jones v. Trustees Florence Wesleyan University*..... 626
13. *Declarations of councilman; when admissible against corporation.* M., the city physician of an incorporated town, duly elected to his office by the corporate authorities, wishing to be paid *extra* compensation for attention to *small-pox cases*, went before the town council, and requested to know what extra compensation would be allowed him, and was told in reply to his request, by one of the councilmen, in hearing of all the others of the council then present in the council-room and engaged in their regular business, and without any objection from any councilman present, "*Doctor, go on with your small-pox cases, and we will do what is just and right; can't you take our faces for that?*"—*Held*, that this is competent evidence for M. in a suit against the corporation for extra compensation for services in such small-pox cases, in connection with other proof that such services were performed and accepted by the corporation, when the action is "on account or verbal contract."—*City of Selma v. Mullen*..... 411
14. *Same; effect of.*—After such a declaration, the corporation is bound to pay what is just and right for the extra services thus rendered. And the corporation can not, by resolution of the council or by-law, fix the amount of extra compensation without the assent and concurrence of M., the physician.—*S. C.*..... 411
15. *Plaintiff's declarations; not admissible in his own favor.*—What a plaintiff said to his partner and co-plaintiff about defendant's warranting a horse to be sound, in the absence of defendant, and after the sale, is not evidence to prove a warranty of soundness in an action for a breach of such warranty.—*Smith v. Flagg*..... 624
16. *Transactions by deceased; what competent evidence of.*—The letters of an intestate, written to parties claiming indebtedness against his estate, and his drafts drawn on and accepted by them, and in their possession, are competent evidence of transactions between the parties to which they refer, tending to establish the correctness of the claims.—*Prestridge v. Patrick Irwin & Co*..... 653

EVIDENCE—CONTINUED.

PAROL AND WRITTEN.

17. *Contents of unstamped written agreement.*—Where the written instrument which is the foundation of the suit is unstamped, and excluded as evidence for that reason, the contract evidenced by such written instrument can not be proved by oral evidence.—*Mobile & Girard Railroad Company v. Edwards* 267
18. *Insolvency* —In an action for the conversion of a promissory note, the insolvency of the maker of the note may be shown by parol evidence.—*McPeters v. Phillips* 496
19. *Acceptance by corporation of subscription.*—The acceptance by the trustees of an incorporated university of the terms of a subscription to its endowment fund may be proved by parol testimony. *Jones v. Trustees Florence Wesleyan University*..... 626
20. *Sale of land by decree of probate court; for what purpose parol evidence inadmissible.*—In an action for the recovery of land brought by the heirs of a decedent against a purchaser at a sale under an order of the probate court, parol evidence is inadmissible to prove the non-payment of the purchase-money, after a conveyance has been made by order of the court on the application of the purchaser under § 2096, Revised Code.—*Dugger v. Tayloe*..... 320

RECORDS.

21. *Transcript, authentication of; when sufficient.*—A transcript of the judicial proceedings of a court of record in this State is sufficiently authenticated to be admissible in evidence in any other court of the State when certified by the proper officer under the seal of the court.—*Cockran v. The State*..... 714

EXECUTION.

1. *For sale of attached lands.*—Lands levied upon by attachment, after judgment for the plaintiff, may, as well as personal goods so levied on, be sold at the election of the plaintiff, by either a *venditioni exponas* or the ordinary writ of *fieri facias*.—*Autry v. Walters*..... 476
2. *On judgment against administrator of insolvent estate.*—No execution can issue upon a judgment which is obtained against the representative, after a declaration of insolvency.—*Cogburn v. McQueen*, 551

EXECUTORS AND ADMINISTRATORS.

1. *Liability on contract.*—Where a purchaser at an executor's sale of his testator's personal property made in 1860, by agreement with the executor in 1864, settled his debt with Confederate currency, which he immediately received back as administrator of a deceased distributee's estate in part payment of his intestate's share,—*Held*, the contract was supported by such partial payment, and the purchaser was liable, as administrator, to the estate he represented, and not as debtor to the estate from which he purchased.—*Wright v. Stott*..... 200

EXECUTORS AND ADMINISTRATORS—CONTINUED.

2. *Transfer of note by executor.*—A promissory note payable to executors, transferred by them in payment of a liability of the estate of equal amount, may be sued on by the holder. These facts will protect the maker against any suit instituted by an administrator *de bonis non* or other representative of the estate.—*Moses v. Clark.* 229
3. *Administrator of administrator; what can not recover.*—The administrator of an administrator is not entitled to recover money due on a promissory note which was made payable to his intestate, but was really assets of the first estate, without proof that his intestate had accounted for it, or been charged with it on settlement. *Dempsey, Harrell & Co. v. Stapleton.* 383
4. *Property exempted from administration; when may be sold by administrator.*—The property of a decedent exempted from administration by section 2061, Revised Code, may be sold by the administrator for the benefit of the family, if not needed for their use. But if he sell it without the consent of the family, he is liable for its conversion.—*Barwick v. Rackley.* 402
5. *Inventory made during the war.*—The inventory and sale bills of an administrator are not inadmissible as evidence, because they were made during the late civil war.—*S. C.* 402
6. *Failure to make settlement; when not good ground for removal of administrator.*—An administrator ought not to be removed for merely failing to make regular settlements, when no damage to the estate is shown, and he has not been required to do so, by either the court or those interested.—*Hightower v. Moore.* 466
7. *Receipt of Confederate currency by administrator; when no ground of removal.*—It is no ground for removing an administrator now, that in 1864 he received Confederate currency in payment for property of the estate sold by him.—*S. C.* 466
8. *Executor; what may not plead without alleging settlement, &c.*—No executor or administrator of a solvent estate can allege his resignation, removal, the revocation of his letters, or that his authority has ceased from any cause, in defense of an action, without an averment that he has settled his accounts, and delivered over the assets of the estate as required by law.—*Cogburn v. McQueen.* 551
9. *Same; what good plea in bar.*—But a plea that before the commencement of the suit, his authority had ceased, the estate had been declared insolvent, and an administrator *de bonis non* was appointed, would bar an action.—*S. C.* 551
10. *Order removing administratrix; when will be presumed to have been made.*—In a collateral proceeding, an order removing an administratrix will be presumed to have been made, when a citation has been served on her to appear and renew her bond, or show cause why she should not be removed; and prior to the day appointed, she filed her accounts for a final settlement, and on the day set for the hearing, an administrator *de bonis non* was appointed, the settlement made, and a judgment for the balance in her hands rendered in favor of the administrator *de bonis non*.—*S. C.* 551
11. *Presumption of final settlement after lapse of twenty years; by what*

EXECUTORS AND ADMINISTRATORS—CONTINUED.

- avoided*.—The presumption of the final settlement and distribution of an estate, after the lapse of twenty years, is avoided, in favor of a distributee, by proof of an annual settlement within the time, and the absence of the administrator from the State a sufficient length of time, during the period within which he might have been called to account.—*Scruggs & Lindsay v. Orme* 533
12. *Annual settlement ; prima facie correct*.—An annual settlement of an estate is to be taken as *prima facie* correct on final settlement. *S. C.* 533
13. *Order removing executor ; when void*.—An order of the probate court removing an executor, made at a special term, to which the cause was not adjourned or appointed, is void.—*Boynton v. Nelson* 501
14. *Same ; what order not grantable as of course*.—Such an order is not one which is grantable of course in the contemplation of section 795 of the Revised Code.—*S. C.* 501
15. *Statutes relating to removal*.—The statute upon the removal of executors and administrators is *pari materia*, and must be construed together as one law.—*Crawford v. Tyson* 299
16. *When executor may be removed without written application*.—Upon the removal of an executor or administrator from this State, the judge of probate of the county in which the letters testamentary have been granted, may, for this cause, proceed to remove him from his office of such executor or administrator, under section 2029 of the Revised Code, without an application in writing therefor.—*S. C.* 299
17. *Notice of proceedings for removal, to non-resident executor*.—In such a proceeding, such non-resident executor or administrator may be notified by publication, under section 2022 of the Revised Code, of the proceedings against him, and a removal upon such notice by publication is not void for want of sufficient notice. Publication is a proper mode of service of citation against a non-resident.—*S. C.* 299
18. *Surety on administration bond ; what liability of, not discharged by*.—The liability of a surety on an administrator's bond is not discharged by his death, although the default occurred afterwards. *Hightower v. Moore* 387

EXEMPT PROPERTY.

1. *Exemption statutes construed*.—In this State the claim of a resident citizen to such portion of his personal property as is exempt from sale on execution, or other final process of any court, issued for the collection of any debt, is an important and "valuable legal right."—18 Ala. Rep. 127.—*Webb v. Edwards* 17
2. *Same*.—Laws for the protection of this right in this State have always been liberally construed.—22 Ala. 624.—*S. C.* 17
3. *Same*.—Under the laws of Alabama, money is personal property, and a resident of this State is entitled to have \$1,000 of his personal property exempt for the use of his family, and the personal property so reserved may consist of money. Under the constitu-

EXEMPT PROPERTY—CONTINUED.

- tion, a resident without a family may claim this exemption.—Const. Ala. 1867, Art. 14, § 1 ; Revised Code, § 2884.—*S. C.*..... 17
4. *Same*.—A defendant in an attachment and garnishment suit may go into the circuit court, and on motion in that court may claim a sum of money equal to the value of \$1,000, while in the hands of the garnishee against whom judgment has been rendered, or after the same has been collected by the sheriff on execution against the garnishee, and have his claim to the money thus collected tried and determined by a jury, as upon a motion to show cause against a rule for the payment of the money to the claimant as his exempt property.—*S. C.*..... 17
5. *Some ; verdict of jury on trial of such motion, effect of*.—On the trial of such a motion, when all the parties in interest are before the court, and there is no exception, the verdict of the jury is conclusive, if the law is with the claimant.—*S. C.*..... 17
6. *Exemption, claim of ; when not too late*.—The claim of such exemption does not come too late when it is made before the money thus collected is paid over to the plaintiff in the attachment suit.—*S. C.* 17
7. *Exemption of decedent's homestead*.—A leasehold is not such an estate as the widow of the lessee is entitled to retain the rents and profits of, by Art. 14, § 5 of the State constitution.—*Pizzala v. Campbell*..... 35
8. *Property exempted from administration ; when may be sold by administrator*.—The property of a decedent exempted from administration by section 2061, Revised Code, may be sold by the administrator for the benefit of the family, if not needed for their use. But if he sell it without the consent of the family, he is liable for its conversion.—*Barwick v. Rackley* 402
9. *Same ; when widow is estopped from suing for*.—The consent of the widow to the sale of such property, in consideration of an invalid agreement with the administrator, is no consent. But a sale at her request estops her from suing for the conversion.—*S. C.*..... 402
10. *Same ; power of widow to sell*.—The widow, when she is the head of the family, may sell such property ; and if the family is to be dispersed, she may sell her interest in it without regard to whether it has been set apart or not.—*S. C.*..... 402
11. *Same ; when guardian liable for conversion of*.—The guardian of an infant member of the family is liable for a conversion, if he sells the child's interest in the property. *Secus*, if the child be withdrawn from the family.—*S. C.*..... 402

FINES.

See CRIMINAL LAW, 15.

GARNISHMENT.

1. *Answer of garnishee ; what plaintiff may require when unsatisfactory*.—When the answer of a garnishee is not satisfactory to the plaintiff, he is entitled to examine him orally in the presence of the court,

GARNISHMENT—CONTINUED.

- or he may make affidavit that he believes the answer to be untrue, and have an issue made up for trial.—*Wright v. Swanson*..... 708
2. *Same; when garnishee can not object to irregular mode of contest.* If the plaintiff obtain leave of the court to file interrogatories, and the cause is continued under agreement to give time to the garnishee to answer, he can not at the next term object to the manner of his examination.—*S. C.*..... 708
3. *Same.*—In such a case, if the answer to the interrogatories is insufficient, the plaintiff ought to be allowed an oral examination. *S. C.*..... 708
4. *Claim of exemption by defendant.*—A defendant in an attachment and garnishment suit may go into the circuit court, and on motion in that court may claim a sum of money equal to the value of \$1000, while in the hands of the garnishee against whom judgment has been rendered, or after the same has been collected by the sheriff on execution against the garnishee, and have his claim to the money thus collected tried and determined by a jury, as upon a motion to show cause against a rule for the payment of the money to the claimant as his exempt property.—*Webb v. Edwards*..... 17
5. *Verdict of jury on trial of such motion, effect of.*—On the trial of such a motion, when all the parties in interest are before the court, and there is no exception, the verdict of the jury is conclusive, if the law is with the claimant.—*S. C.*..... 17
6. *Same; when not too late.*—The claim of such exemption does not come too late when it is made before the money thus collected is paid over to the plaintiff in the attachment suit.—*S. C.*..... 17

GUARDIAN AND WARD.

1. *Liability of guardian for interest.*—Generally, a guardian is only liable to account for simple interest. He can not be charged compound interest unless he receives compound interest, or has been guilty of a gross abuse of his trust.—*Vaughan and Wife v. Bibb*... 153
2. *Probate court, power of to re-state accounts during same term.*—The court of probate may recall and re-state an account of a guardian, once allowed and passed, during the same term at which it was so passed. The court's power over such a proceeding does not end until the court is adjourned without day for the term.—*S. C.*..... 153
3. *Receipt of ward and husband; when binding.*—If a married woman and her husband join in a receipt to her guardian for a sum of money due her as the ward of such guardian, the receipt is binding on her, unless there is mistake or fraud.—*Ordin. No. 38, 1867. S. C.*..... 153
4. *Receipt for Confederate money.*—Though the consideration of such a receipt may have been land or Confederate money, it would not be void for this reason. And the ward would be bound for the amount at which she and her husband re-sold the land thus obtained, though she only received Confederate money in payment, when there was no dissatisfaction manifested by her and her husband with the sale thus made.—*S. C.*..... 153

GUARDIAN AND WARD.—CONTINUED.

5. *Action by guardian.*—Where a plaintiff styles himself guardian of A. B., and declares on a note payable to him, in that character, but the suit is not brought for the use of the ward, the action is his individual suit, and the superadded words, "guardian of A. B.," will be regarded as mere *descriptio personæ*; and on the death of the plaintiff the suit should be revived in the name of his personal representatives.—*Bradley v. Graves*..... 277
6. *Same; what constitutes payment.*—In such a case, if the action is revived in the name of the ward, who has become of full age, without objection, a payment made to the deceased plaintiff, before suit brought, will be an extinguishment of the debt, and a good defense to the action, although the note may remain in the hands of the payee, after payment, and, subsequently, come to the possession of the ward, before the suit is so revived in his name; unless the note was left in the hands of the payee for an improper and fraudulent purpose.—*S. C.*..... 277
7. *Conversion of exempt property by guardian.*—If the guardian of an infant member of a decedent's family sells his ward's interest in property exempt from administration, (Rev. Code, § 2061,) he is liable for a conversion; *secus*, if the child has been withdrawn from the family. *Barwick v. Rackley*..... 402
8. *With what guardian is chargeable on final settlement.*—A guardian who receives in payment of a solvent debt, due to his ward, the note of a third person instead of money, receives the same at his peril, and if he fails to collect said note, and the maker becomes insolvent, must, on his final settlement, be charged with the amount of the debt, and interest on the same from the time it was due, although he may have used due diligence to collect said note. *Lane and Wife v. Mickle*..... 600
9. *Settlement in chancery.*—A bill which shows that the guardian accounted regularly during his life for his ward's estate, but died before final settlement, and that the final settlement was made by his representative after death, and when the decree on such settlement seems regular on its face, is demurrable for want of equity, unless it shows that the decree was erroneous by reason of mistakes or fraud. A mere allegation that there were sums of money in the guardian's hands unaccounted for, without showing what they were, or fraud or mistake, is not enough to give equity jurisdiction.—*Bibb and Wife v. Carpenter*..... 584
10. *Same.*—It is a sufficient ground for transferring, at the suit of the ward, the settlement of a guardianship account from the probate to the chancery court, that the guardian was a certificated bankrupt, and died leaving no estate whatever.—*Jones & Cullom v. Knox*..... 53

HUSBAND AND WIFE.

1. *Attachment to enforce payment of debt against husband and wife, contracted under section 2376 of the Revised Code.*—Whether or not an attachment can be issued against husband and wife to enforce

HUSBAND AND WIFE—CONTINUED.

- payment of a debt contracted under section 2376 of the Revised Code, is an open question, which the court will decide when a proper case arises.—*Wright and Wife v. Snedecor*. 92
2. *Husband's power to correct wife*.—In this State a husband can not commit a battery upon his wife, by way of inflicting upon her "moderate correction" in order to enforce obedience to his just commands.—(PECK, C. J., *dissenting*.)—*Fulgham v. The State*. . . . 143
3. *Same*.—The authority for "wife whipping" rests upon a relic of a barbarous and unchristian "privilege," which, even in the mother country, was never claimed to be law, except among people of the "lower rank." The law in this country recognize no such distinction.—*S. C.* 143
4. *Receipt of married woman and husband; when binding*.—If a married woman and her husband join in a receipt to her guardian for a sum of money due her as the ward of such guardian, the receipt is binding on her, unless there is mistake or fraud.—Ordin. No. 38, 1867.—*Vaughan and Wife v. Bibb* 153
5. *Separate estate of married woman; what will be subjected in equity to payment of note executed by her during coverture*.—Where a feme sole, in contemplation of marriage, by an ante-nuptial deed conveys her property to a trustee, in trust to her sole and separate use, for the support and maintenance of her intended husband and herself, and such children as they may have, chancery will charge it with the payment of a promissory note, made by her after the marriage, for her own debt; and a bill filed for that purpose need not state that the debt was contracted for "family supplies or maintenance."—*Brame v. McGee* 170
6. *Separate estate of married woman; of what consists*.—Under the laws of this State, all the property of a married woman is her separate estate, if it has accrued to her since the adoption of the Code of Alabama.—*Stone & Matthews v. Gazzam*. 269
7. *Same; deed by husband to wife*.—The deed of a husband, made in this State since the adoption of the Code of Alabama, to the wife, on a valuable consideration paid by her to him, by which he conveys to her his interest in a steamboat and its equipments in this State, if free from fraud, is not void. Such a deed, if voidable, can only be avoided by the parties to it, or their creditors, and not by a stranger.—*S. C.* 269
8. *Same; possession of steamboat under such deed; what contract will authorize wife to make, and sue on in her own name*.—The possession derived from such a deed will authorize the wife to use the boat in the business of transportation on the navigable waters of this State, and to enter into a contract for the repairs of its machinery, and upon a breach of a contract for such repairs, she may bring an action for damages on such contract in her own name as owner of the boat.—*S. C.* 269
9. *Husband, conveyance of to trustee for wife; what title confers on trustee*.—A bona fide conveyance by the husband to a trustee for the use of his wife, of property purchased by him chiefly with funds

HUSBAND AND WIFE—CONTINUED.

- of his wife, received from her guardian, the title to which he took in his own name, made in consideration of such funds so received and appropriated by him, confers on the trustee such an interest in the property as will enable him to maintain trover for its conversion.—*Ryan v. Bibb*..... 323
10. *Plea of coverture*.—In a suit against one of the makers of a promissory note, a plea by the defendant that his co-maker was, at the time of making the note, a married woman and principal in said note, and that he signed it as her surety, is subject to demurrer.—*Crumbley v. Searcey*..... 328
11. *Separate statutory estate; what constitutes part of corpus of*.—The rents and profits of land subject to the quarantine of a widow, belong to the *corpus* of her separate estate.—*Dempsey, Harrell & Co. v. Stapleton*..... 383
12. *Husband's authority as trustee; what action of wife can not divest*. A wife cannot divest her husband of his authority as her trustee over her separate statutory estate, by contracting with one to whom she lends money, that the borrower is to pay it to her and not to her husband, he not being a party to the agreement.—*Hall v. Creswell* 460

INDICTMENT.

See, CRIMINAL LAW.

INFANTS.

1. *Contracts of*.—Generally in this State, the contracts of an infant are voidable, but not void. And such contracts may be affirmed or avoided by such infant after he becomes of age.—*Shropshire v. Burns*..... 108
2. *Infancy, defence of; by whom only can be pleaded*.—Infancy is a personal privilege, and it can only be taken advantage of by the infant himself, or by his personal representative.—*S. C.*..... 108
3. *Ratification of contract; what will amount to*.—In like manner, the infant or his personal representative may affirm and ratify his contracts after he becomes of age; and the acts which will amount to ratification by an infant himself, will amount to a ratification after his death by his administrator or executor.—*S. C.*..... 108
4. *Same*.—If a minor above the age of twenty, but under the age of twenty-one years, purchase a horse and give his promissory note for the purchase-money, and the horse is delivered to him, and the minor then dies before he attains his majority, and the horse comes into the possession of the administrator of the infant's estate, who sells the horse as the decedent's property, with a full knowledge that it had been so purchased by the infant, and had not been paid for, this is a ratification of the sale.—*S. C.*..... 108
5. *Jurisdiction of chancery over*.—If a bill be filed relative to an infant's estate or person, the chancery court acquires jurisdiction,

INFANTS—CONTINUED.

- and the infant, whether plaintiff or defendant, immediately becomes a ward of the court.--*Rivers v. Durr*..... 418
6. *Same; when decrees of are binding on infants*.—Decrees made in suits by infant plaintiffs, are as binding upon them as upon adults.—*S. C.* 418
7. *Same; power of to change property of infants*.—Whether the chancery court has or has not jurisdiction to sell the real estate of tenants in common for division, lands so sold at the suit of an infant, when that is the only objection to the sale, may be referred to the power of the court to change the property for the benefit of the infant, when the infant seeks to recover the land from the purchaser by action of ejectment.—*S. C.*..... 418
- See, also, ESTATES OF DECEDENTS, 16, 17, 19.

INSOLVENT ESTATES.

1. *Filing claims*.—A claim against an estate which has been declared insolvent must be filed in the office of the judge of probate *after* the estate is so declared insolvent, within the time and in the manner required by the statute, or the same will be barred forever. Rev. Code, § 2196, 2200, 2201.—*Clement v. Nelson*..... 634
2. *Same*.—A filing *before* the declaration of insolvency under section 2241 of the Revised Code is not sufficient to save the claim from the bar on a proceeding of insolvency, but only from the bar of non-presentation, or non-claim.—Rev. Code, § 2241.—*S. C.*..... 634
3. *Claim, verification of, by one who does not know correctness; effect of*.—The verification of a claim against an insolvent estate by one who really does not know it to be correct, if complete in form, is defective or insufficient only, and may be completed by proof at any time before the final decree.—*Prestridge v. Patrick, Irwin & Co.* 653
4. *Execution on judgment*.—No execution can issue upon a judgment which is obtained against the representative, after a declaration of insolvency.—*Cogburn v. McQueen*..... 551

INSURANCE.

1. *Policy issued to partnership; what not vitiated by*.—A policy of insurance on a stock of goods, issued to a partnership, is not vitiated by a transfer by one partner of all his interest to his copartners, notwithstanding a provision in the contract that the policy shall be void if the property should “be sold or conveyed, or the interest of the parties therein changed.”—*Burnett & Martin v. Eufaula Home Insurance Co.*..... 11
2. *Same; conditions for disabilities in, how construed*.—Conditions for disabilities and forfeitures, where the intent is doubtful, are to be construed against those for whose benefit they were imposed.—*S. C.* 11

INSURANCE COMPANIES.

1. *Tax for benefit of medical college at Mobile*.—The annual payment of \$200 to the medical college of Alabama, at Mobile, imposed by section 1186 of the Revised Code on all insurance companies not

INSURANCE COMPANIES.—CONTINUED.

- incorporated by this State, and doing business in the city or county of Mobile, was in the nature of an impost or tribute. The college acquired no vested right to it, because no consideration moved from the college.—*Ala. Medical College v. Muldon & Sons*..... 603
2. *Same; force and effect of act repealing, on suits brought afterwards*.—The college can not maintain an action commenced after the repeal of the law requiring such payment, to recover the amount due up to the time of the repeal. A statute, when repealed, must be considered, except as to transactions which are passed and closed, as if it never existed.—*S. C.*..... 603

INTEREST.

1. *Liability of guardian for*.—Generally, a guardian is only liable to account for simple interest. He can not be charged compound interest unless he receives compound interest, or has been guilty of a gross abuse of his trust.—*Vaughan and Wife v. Bibb*..... 153
2. *Liability of bailee for*.—If one person holds the money of another on deposit to keep until demanded, and on demand and without reasonable excuse refuses to deliver such money, he becomes liable for interest from the time of the demand.—*Ingersoll v. Campbell*, 282
3. *Purchaser at judicial sale; when liable for interest on arrears of interest*.—Where, in execution of an ante-nuptial agreement that the wife should have one-third of all the real and personal property her husband should die seized and possessed of, during her life or widowhood, in lieu of her dower and distributive share, the chancery court, with the consent of the widow, decreed a sale of the lands of the deceased husband, free from any claim of the widow, and prescribed as a part of the terms of sale that one-third of the price should be payable on the termination of her life or widowhood, but the interest thereon should be annually paid to her,—*Held*, that the purchaser was liable to her for interest on the arrears of interest.—*Turrentine v. Perkins*..... 631
4. *Merchants, accounts between; when closed and draw interest*.—An account between merchants is closed at the date of the last item, and the balance will draw interest from that time.—*Prestridge v. Patrick Irvin & Co.*..... 653

INTERNAL REVENUE.

1. *Unstamped agreement not admissible evidence*.—A written agreement, the foundation of an action for damages, made in the year 1863, and unstamped, is inadmissible as evidence.—*Mobile & Girard Railroad v. Edwards*..... 267
2. *Terms of such unstamped agreement can not be proved by parol evidence*.—Where the written instrument which is the foundation of the suit is unstamped, and excluded as evidence for that reason, the contract evidenced by such written instrument can not be proved by oral evidence.—*S. C.*..... 267
3. *Instrument made in 1863; how only can be stamped*.—Such an instrument can only be stamped, since the 1st day of January, 1867, by the revenue collector of the proper district.—*S. C.*..... 267

JUDGMENTS AND DECREES.

1. *Confederate judgments ; force and effect of.*—The judgments of the Confederate government in this State, rendered during the late rebellion, do not operate as liens on the lands of the defendant therein. They have only the force of the judgments of foreign courts.—*Shaw v. Lindsay*..... 290
2. *Same ; when sale of land under will not be set aside.*—A sale of the lands of a defendant in such a judgment will not be set aside on the motion of a stranger, who has no interest in the judgment, but claims such lands by a title derived from a defendant in such judgment, acquired in 1866, by a purchase independent of the judgment. Such a sale does not necessarily prejudice the rights of such a claimant—*S. C.*..... 290
3. *Same ; what not such a lien as defeats widow's right of dower.*—A judgment of a circuit court, rendered on the 16th day of September, 1861, on which an execution was issued within the year after its rendition and returned unsatisfied, and upon which judgment no other execution was issued until September, 1865, is not a lien on the lands of a defendant in said judgment, which will defeat his widow's right of dower in his dowerable lands, when the marriage with such defendant took place on the 29th day of November, 1862, and after the rendition of such judgment.—*Irvine v. Armistead*.. 363
4. *Judgment final on bail bond ; when cannot be compromised.*—A final judgment on an undertaking of bail cannot be compromised with the solicitor.—*Dunkin v. Hodge* 523
5. *Same ; when cannot be assailed collaterally.*—Such an undertaking can not be collaterally assailed as void, on the ground that the undertaking was approved by the sheriff, in a case of felony.—*S. C.*.. 523
(PETERS, J., dissenting.)
6. *Power of court to amend.*—A mistake in entering a final judgment, whereby the cause is in fact discontinued, may be corrected before the adjournment of the court ; but after the end of the term, and the final adjournment of the court, the court ceases to have any power to correct the error ; and a motion by the plaintiff, at a subsequent term, to set aside the judgment and reinstate the case on the docket, should be denied.—*Curtis v. Gaines* 455
7. *Same.*—The court of probate may recall and restate the account of a guardian, once allowed and passed, during the same term at which it was so passed. The court's power over such a proceeding does not end until the court is adjourned without day for the term. *Vaughan and Wife v. Bibb* 153
8. *Amendment on error.*—A judgment in the court below in favor of the moveant in the court below, "or his attorneys of record [naming them]," will be corrected in this court, when the verdict in the court below was in favor of the moveant and the attorneys were not parties to the suit, by arresting that part ordering payment to the attorneys of record, and the judgment as thus corrected affirmed.—*Webb v. Edwards*..... 18
9. *Recording decree in chancery ; effect of.*—Recording a decree of the chancery court vesting title to real property, under the statute (Clay's Dig. p. 354, § 57,) was not necessary to its validity, but

JUDGMENTS AND DECREES—CONTINUED

- was notice of its contents, as the record of a deed under the registration laws.—*Dudley v. Witter* 664
10. *Judgment on motion affecting adverse party, made after final judgment ; when erroneous.*—After final judgment, the parties are not presumed to be in court ; therefore, any motion made in the cause, after that time, materially affecting the interests of the adverse party, must be on notice, otherwise the judgment will be erroneous.—*Stringer v. Echols* 61
11. *Judgment by default against county ; what service sufficient to authorize.*—A judgment by default against a county, founded upon service of process, which shows that the summons was “executed” by the sheriff, without also showing upon whom the service was made, is not erroneous, for this reason —*Randolph county v. Hutchins* 397
12. *When decrees bind infants.*—Decrees made in suits by infant plaintiffs, are as binding upon them as upon adults—*Rivers v. Durr* 419
13. *Same.*—A decree of the court of probate on the final settlement of an estate by an administrator, when there are minors, who are unrepresented by a guardian *ad litem*, will be set aside as void on motion of the distributees.—*Petty v. Britt's Legatees* 491
14. *Decree of final settlement ; when may be annulled.*—The court of probate may set aside a judgment or decree made therein on the final settlement of an administration, where it appears from the record that the court acted without jurisdiction of the parties or the subject matter.—*S. C.* 491
15. *Order of sale made in 1861 ; only prima facie good.*—An order for the sale of a decedent's lands, for distribution among his heirs, made by a probate court in this State, in the year 1861, is only *prima facie*, and not conclusive.—*McSwean v. Faulks* 610
16. *Order made at special term.*—An order of the probate court removing an executor, made at a special term, to which the cause was not adjourned or appointed, is void.—*Boynton v. Nelson* 501
17. *Annual settlement ; prima facie correct.*—An annual settlement of an estate is to be taken as *prima facie* correct on final settlement. *Scruggs & Lindsay v. Orme* 533

LANDLORD AND TENANT.

1. *Lien on crop for rent, when vendee has.*—The purchaser of rented land who takes an assignment of the contract of rent, has a lien on all the crops grown on the rented land for the current year, by whomsoever made, whether by tenant or under-tenant.—*Simmons v. Fielder & Sessions* 304
2. *Same ; how enforced.*—This lien may be enforced by process of attachment against the tenant, when the covenant or agreement of lease runs with the land, or when the lease has been assigned to the purchaser.—*S. C.* 304
3. *Same ; when can not be enforced.*—But it can not be enforced against the under-tenant by a suit against him, founded on the contract of

LANDLORD AND TENANT—CONTINUED.

- rent made by the tenant with the landlord before the sale.—*S. C.* 304
4. *Same; how enforced by vendee against under-tenant.*—If the under-tenant is sued, he must be proceeded against on his contract with the tenant, and the purchaser must show that the same has been transferred or assigned to him. It does not pass by operation of law upon the sale of the premises to the purchaser.—*S. C.*..... 304

LICENSE.

1. *City license tax of Mobile, who liable to pay.*—A party who carries on business in the lower bay of Mobile, some thirty miles below the city, and outside of the corporate limits of the city, but whose residence is in the city, and who keeps the capital employed in the business there, is not liable to pay a city license tax.—*Bates v. Mayor and Aldermen of Mobile*..... 158

LIEN.

1. *Of landlord, for rent.*—The purchaser of rented land who takes an assignment of the contract of rent, has a lien on all the crops grown on the rented land for the current year, by whomsoever made, whether by tenant or under-tenant.—*Simmons v. Fielder & Sessions*..... 304
2. *Same; how enforced.*—This lien may be enforced by process of attachment against the tenant, when the covenant or agreement of lease runs with the land, or when the lease has been assigned to the purchaser.—*S. C.*..... 304
3. *Same; when can not be enforced.*—But it cannot be enforced against the under-tenant by suit against him, founded on the contract of rent made by the tenant with the landlord before the sale.—*S. C.* 304
4. *Same; how enforced by vendee against under-tenant.*—If the under-tenant is sued, he must be proceeded against on his contract with the tenant, and the purchaser must show that the same has been transferred or assigned to him. It does not pass by operation of law upon the sale of the premises to the purchaser.—*S. C.*..... 304
5. *Liens; how lost.*—Liens at law exist only in cases where the party entitled to them has the possession of the goods. If the possession is parted with, the lien is gone after it attaches.—*Voss & Co. v. Robertson, Brown & Co.*..... 483
6. *Of judgments.*—The act of the general assembly "for the protection of bona fide purchasers for valuable consideration," is not a mere registration act for the protection of innocent purchasers without notice, but is a law regulating the liens of judgments by prescribing the conditions upon which they shall be created and preserved.—*Thornton v. Bledsoe*..... 73
7. *Of Confederate judgments.*—The judgments of the Confederate government in this State, rendered during the late rebellion, do not operate as liens on the lands of the defendant therein. They have only the force of the judgments of foreign courts.—*Shaw v. Lindsay*..... 290

LIEN—CONTINUED.

8. *Same*.—A judgment of the circuit court, rendered on the 10th day of September, 1861, on which an execution was issued within the year after its rendition and returned unsatisfied, and upon which judgment no other execution was issued until September, 1865, is not a lien on the lands of the defendant in said judgment, which will defeat his widow's right of dower in his dowerable lands, when the marriage with such defendant took place on the 20th day of November, 1862, and after the rendition of such judgment.—*Irvine v. Armistead*..... 363

LIMITATIONS, STATUTE OF.

See ADVERSE POSSESSION.

LUNATICS.

1. *Deed by one of non-sane mind void*.—A deed made by a party of non-sane mind, to such a degree as to incapacitate him for making contracts, is void, and his heirs may file a bill in chancery to set it aside.—*Kennedy v. Marrast*..... 10

MANDAMUS.

1. *When granted to commissioners court, to compel subscription to railroad*.—If the commissioners court, after an election, duly held, under the act of December 31, 1868, authorizing counties to subscribe for stock in railroads, refuses to subscribe for the amount of stock named in such proposal, and issue the bonds of the county in payment of the same, it may be compelled to do so by *mandamus*; but if said proposal contains another proposition in addition, as to build a passenger and wagon bridge across a river running through said county, free of toll to all the people of the State, such proposal, containing such an additional proposition, will confer on said court no jurisdiction to submit such proposal to the qualified electors of the county for their acceptance or rejection; and an order of said court, and an election held under it, will be invalid, and will give to said court no authority to subscribe to the capital stock of said railroad company, and issue the bonds of the said county in payment of the same.—*Ex parte Selma and Gulf Railroad Co*..... 230
2. *Same*.—An application for a *mandamus*, in such a case, to compel a court of county commissioners to subscribe to the capital stock of a railroad company, and pay for the same in the bonds of the county, will be denied.—*S. C.*..... 230
3. *Alternative mandamus; return to, need not be single*.—A return to an alternative *mandamus* need not be single, but may contain several causes or defenses, and if one be sufficient, a peremptory *mandamus* will not be issued.—*S. C.*..... 230
4. *When not issued to governor*.—The duties devolved on the governor by the act of February 18, 1860, "to loan and appropriate the three per cent. fund," are to be performed by him, under the law, in his

MANDAMUS—CONTINUED.

- own way. The performance of his duties is not to be controlled by this court or any other, when he acts under authority of law. Of such things he is the sole judge, in the executive branch of the State government.—*S. C.* 423
5. *When granted against treasurer.*—Upon the issuance or drawing of the “warrants,” as authorized by said act, to the party entitled to the same, unless there is fraud, the warrants so issued or drawn give a right to the company in whose favor they are drawn, to the amounts therein named, upon the treasury of the State, which, upon proper application, the treasurer can not refuse to pay, unless there is a deficiency of funds in the treasury for that purpose. Such right will be enforced by *mandamus*.—*S. C.* 423
6. *To circuit court.*—After the circuit court has heard a motion to quash an attachment, and to strike the same from the docket, because the affidavit does not disclose any cause of action, or a cause of action for which an attachment is authorized to be issued, and also because the action is discontinued, and after argument, &c., overrules the motion and enters judgment accordingly, a *mandamus* will not be issued to compel said court to grant said motion—the remedy for any error of the court in overruling the motion, is by appeal, after final judgment, and not by *mandamus*.—*Ex parte Bottoms* 312
7. *To chancery court; to compel reinstatement of cross-bill dismissed before final determination of cause.*—As no appeal lies from an order of the chancellor dismissing such cross-bill, before the final determination of the cause, *mandamus* is a proper remedy to compel the setting aside of such an order of dismissal and the restoration of such cross-bill upon the docket, to abide the final determination of the whole cause.—*Ex parte Thornton*. 384

NUISANCE.

1. *What is.*—A cooking range or stove erected so near to the partition wall of two houses as to injure, by its ordinary use, the goods of the adjacent proprietor, and render his house uncomfortable and disagreeable, is a nuisance.—*Grady v. Wolsner* 381
2. *When action lies for.*—An action on the case lies against him who erects a nuisance, and also for its continuance, though he has leased it to another.—*S. C.* 381

OFFICERS.

1. *Act to authorize governor to fill vacancies in certain county offices; not unconstitutional.*—The act of the general assembly of Alabama, entitled “An act to authorize the governor to fill vacancies in certain county offices,” approved November 25, 1868, is not unconstitutional and void, but a valid constitutional act of the general assembly of this State, and authorizes the governor to fill all vacancies in the offices provided for by said act.—*Falconer v. Robinson*. . 340
2. *Same; persons appointed under, hold for what term.*—Persons ap-

OFFICERS—CONTINUED.

pointed by the governor, and duly commissioned by him, by virtue of said act, hold their office until the next general election to be held after such appointment.—*S. C.*..... 340

OUTLAW.

1. *Outlawry; can not be pronounced by an act of the legislature.*—Outlawry, legally speaking, is a judicial proceeding, and no one can be outlawed but in such a proceeding, and “by due process of law.” An act of the legislature is not “due process of law.”—*Dale County v. Gunter.* 118
2. *Meaning of term as used in section 1 of act of 28th December, 1868.* The word “outlaw,” as employed in the first section of said act, is not to be understood in the sense of that term as used in the English statutes and common law, but is to be understood as referring to the character of person or persons named in the act entitled “An act for the suppression of secret organizations of men disguising themselves for the purpose of committing crimes and outrages,” approved December 26, 1868, and who by said act, while under cover of such disguise, and while in the act of committing, or threatening, or attempting to commit, the offenses therein named, are put out of the protection of the law, and may lawfully be shot or killed by any person.—*S. C.*..... 118

PARTITION.

1. *Partition, &c., bill for; when decree for rent, &c., may be rendered on.*—On a bill for partition, where one of the tenants in common has been in the exclusive possession and enjoyment of the joint property, the chancellor, in a proper case, may decree an account for occupation, rent, &c.—*Oliver v. Jernigan.* 41
2. *Chancery, court of; what sale has no jurisdiction to decree.*—In this State, the court of chancery has no jurisdiction to decree the sale of the lands of a tenant in common, who is of full age, without his consent, for the purpose of partition, because the same can not be equitably divided.—*S. C.*..... 41
3. *Tenant in common of full age, lands of; when can not be exactly divided, what allotment may be made.*—If the lands of tenants in common of full age are not susceptible of an exact division, an allotment may be made in unequal shares, with compensation for the inequality, by creating a rent or charge upon the land; or, if the land allotted to one exceeds in value that allotted to the other, the court may compel the former to make compensation to the latter, for equality of compensation.—*S. C.*..... 41
4. *Same; rules as to partition of lands, title of which is in dispute, to what applies.*—The general rule, that partition will not be decreed in equity where the title is in dispute, applies to a legal and not an equitable title; and if, on a bill of partition, the defendant wishes to avail himself of an equitable defense, as, for instance, a defense

PARTITION—CONTINUED.

- arising out of a contract for purchase, &c., he must file a cross-bill, or, under our system, he may set it up in his answer in the nature of a cross-bill, and pray such relief as he may believe he is entitled to.—*S. C.*..... 41
5. *Same; power of court to change property of infants.*—Whether the chancery court has or has not jurisdiction to sell the real estate of tenants in common for division, lands so sold at the suit of an infant, when that is the only objection to the sale, may be referred to the power of the court to change the property for the benefit of the infant, when the infant seeks to recover the land from the purchaser by action of ejectment.—*Rivers v. Durr*..... 418

PARTNERSHIP.

1. *Insurance, policy of, issued to partnership; what not vitiated by.* A policy of insurance on a stock of goods, issued to a partnership, is not vitiated by a transfer by one partner of all his interest to his copartners, notwithstanding a provision in the contract that the policy shall be void if the property should “be sold or conveyed, or the interest of the parties therein changed.”—*Burnett & Martin v. Eufaula Home Insurance Co.*..... 1*

PAYMENT.

1. *Promissory note; what constitutes payment.*—Where the plaintiff styles himself guardian of A. B., and declares on a note payable to him in that character, but the suit is not brought for the benefit of the infant, if the action is revived in the name of the ward, who has become of full age, without objection, a payment made to the deceased plaintiff, before suit brought, will be an extinguishment of the debt, and a good defense to the action, although the note may remain in the hands of the payee, after payment, and, subsequently, come to the possession of the ward, before the suit is so revived in his name; unless the note was left in the hands of the payee for an improper and fraudulent purpose.—*Bradley v. Graves*..... 277
2. *When receipt of Confederate money by trustee will not amount to payment.*—Where, in execution of an ante-nuptial agreement that the wife should have one-third of all the real and personal property her husband should die seized and possessed of, during her life or widowhood, in lieu of her dower and distributive share, the chancery court, with the consent of the widow, decreed a sale of the lands of the deceased husband, free from any claim of the widow, and prescribed as a part of the terms of sale that one-third of the price should be payable on the termination of her life or widowhood, but the interest thereon should be annually paid to her,—*Held*, that though the note for the purchase-money was taken payable to the register, he was not authorized to bind the beneficiary without her consent, or to acquit the debtor, by receiving Confederate currency in payment of any part of the interest.—*Turrentine v. Perkins*..... 631

PLEADING AND PRACTICE.

PARTIES..

1. *In action on bill of exchange*.—An action on a bill of exchange, payable to the order of the drawer, and by him indorsed, may be maintained by the indorsee in his own name, as if he were the payee. *Hart v. Shorter & Baker*..... 453
2. *In action on special contract*.—A written contract for the construction of a house for a specified sum of money, signed by the parties, with an obligation beneath as surety for the faithful performance of the contract by the builder, signed “Phillip ^{his} O'Donnell,” and ^{mark.} attested by two witnesses, whose names are written on the same page, but midway between those of the principals and the surety, was offered in evidence to support a suit for damages for non-performance of the contract prosecuted against the builder and surety jointly,—*Held*, 1st. A joint suit against the defendants might be maintained upon it.—*McQuaid v. Powers & O'Donnell*..... 45

COMPLAINT.

3. *In action on bill of exchange*.—The indorsee of a bill of exchange, payable to the order of the drawer, and by him indorsed, may maintain an action on it in his own name against the acceptor; and the complaint may be in the form prescribed by the Code, “by payee against acceptor.—*Hart v. Shorter & Baker*..... 453
4. *Action by guardian*.—Where a plaintiff styles himself guardian of A. B., and declares on a note payable to him, in that character, but the suit is not brought for the use of the ward, the action is his individual suit, and the superadded words, “guardian of A. B.,” will be regarded as mere *descriptio personæ*; and on the death of the plaintiff the suit should be revived in the name of his personal representatives.—*Bradley v. Graves*.... 277

PLEAS.

5. *Variance between cause of action stated in affidavit, &c., and that stated in complaint; how may be taken advantage of*.—In an action commenced by attachment, a variance between the cause of action stated in the affidavit and attachment, and the cause of action described in the complaint, may be pleaded in abatement.—*Wright and Wife v. Snedecor*..... 92
6. *Coverture*.—The plea of coverture is a personal defense, and not available to a co-defendant.—*Crumbley v. Searcey*.. 328
7. *Pleas; what defects of, net good ground of demurrer to*.—Defects in stating the commencement or conclusion, or in the prayer, of a plea of abatement, are not defects of substance, and therefore, no good cause of demurrer; nor is duplicity, in such a plea, a good ground of demurrer.—*Hall & Curry v. Brazelton*..... 359
8. *Pleading, what sufficient under the system provided by the Revised Code*.—The common law strictness required in pleas in abatement, is abolished with us, and pleas in bar and abatement stand on the

PLEADING AND PRACTICE—CONTINUED.

- same footing, and all that is necessary in either is to state, succinctly, the facts relied on, in such manner as to present a material issue.—*S. C.* 359
9. *Plea of nul tiel corporation*.—A corporation, when sued on a contract made by it, can not plead *nul tiel* corporation, unless in case of misnomer or dissolution.—*McCullough v. Talladega Ins. Co.* ... 376
10. *Plea in bar, suggesting claimant; when subject to demurrer*.—A plea in bar which in substance merely suggests another claimant for the money sought to be recovered, without a request for an interpleader, is subject to demurrer. Also, when the matter arose after the commencement of the suit, and is not pleaded *puis darrein continuance*.—*Atkins v. Knight*. 520
11. *When sworn plea is necessary*.—Section 2682 of the Revised Code applies to written instruments, the foundation of the suit, purporting to be made by a corporation defendant, its agent or attorney, in like manner as it applies to instruments purporting to be made by natural persons, &c., and must be received in evidence without proof of the execution, unless the execution thereof is denied by plea verified by affidavit.—*Oxford Iron Co. v. Spradley* 99

* GENERAL PRACTICE.

12. *Appearance, withdrawal of; presumption in regard to, under facts of this case*.—Where the entry of a judgment by default recited that the plaintiff came by his attorney, "and the counsel of the defendant ask leave to withdraw their appearance, which is granted, and the defendant being called, came not, but made default," &c., and this was the only evidence of any appearance by the defendant,—*Held*, on appeal, that it was not the defendant's appearance that was withdrawn, but that of the counsel, as erroneously entered.—*Harrison v. Holley* ... 84
13. *Appearance; effect of*.—Where the defendant is sued as a corporation aggregate, the appointment of an attorney, and an appearance entered by him, is an admission of record of the corporate character of the defendant.—*Oxford Iron Co. v. Spradley*. 98

PUBLIC LANDS.

1. *Acts of congress of April 20, 1818, and March 3, 1817, construed*. The acts of congress approved April 20, 1818, and March 3, 1817, authorizing the reservation of ten sections in any one land district in the Alabama and Mississippi territories, for the purpose of laying out and establishing towns thereon, did not donate any title or interest in the sections so reserved, to the State of Alabama, or the towns built upon them.—*City of Tusculumbia v. Lindsay*. 581
2. *Act of congress of August 4, 1852; when ceases to operate as a grant of the right of way*.—The act of congress of August 4, 1852, which grants to railroad companies the right of way over the public lands in the States where such lands lie, ceases to operate on such lands after they have been entered and purchased by the citizen; unless the railroad company claiming such right of way has located its

PUBLIC LANDS—CONTINUED.

roadway and filed a plat of the location of the same with the commissioner of the general land office of the United States at Washington, in the manner required by said act of congress, before said entry is made.—*Alabama and Florida Railroad Co. v. Burkett*.... 569

RAILROADS.

1. *Railroad companies are common carriers.*—A railroad company in this State is a common carrier, and whilst the goods are *in transitu* it is liable to all the responsibilities of common carriers.—*Mobile and Girard Railroad Co. v. Prewitt*..... 63
2. *Same; when liability of, as common carrier, ceases.*—But where the bill of lading shows that the goods transported were shipped to the owner as consignee, "care of the railroad company," to be delivered at a station on the railroad, if the goods are transported with the usual expedition, and the owner or his agent is not at the depot designated for the delivery at the time the goods arrive, ready to receive them, the goods may be deposited in the warehouse of the company, and from such deposit the liability of the company as common carrier ceases.—*S. C.*..... 63
3. *Same; when responsible as warehouseman for hire.*—Goods so deposited must be kept by the company under the responsibility of warehousemen for hire, whether actual storage be charged or not, and the company must act without fraud or bad faith.—*S. C.*..... 63
4. *Same; when charge that carrier is liable only for loss occasioned by gross negligence, is correct.*—In a suit for damages for loss of the goods in such a case, if there are two counts in the complaint, the one on a contract of common carriers, and the other on a contract of a warehouseman without hire, a charge asked by the defendant under the latter count, that the company is only responsible for losses and injuries occasioned by gross negligence, is proper, and should be given.—*S. C.*..... 63
5. *Statutes in relation to; how construed.*—The sections of the Revised Code upon railroads are to be construed as one law, and taken together as a whole.—*Mobile and Ohio Railroad Co. v. Malone*. 391
6. *Liability for stock killed, &c.*—Railroad companies, in this State, are liable for damages for killing or injuring stock by their locomotives and cars, if they fail to comply with the requirements of caution prescribed in the Revised Code, when such compliance is within the power of their engineers or agents.—*S. C.*..... 391
7. *Same; what diligence must be shown to relieve from liability.*—But if these requirements are not complied with, the company is bound to show that their agents or servants used all the means in their power, under the circumstances, known to skillful engineers, to prevent the injury complained of. When this is shown, the company is not liable.—*S. C.*..... 391
8. *Claim, presentation of; what sufficient.*—Proof that the auditor of the company had frequently acted as depot agent and received and paid claims for stock killed, there being no proof that there was any depot agent at the place where the claim was presented, shows a sufficient compliance with the Revised Code, requiring claims

RAILROADS—CONTINUED.

- for stock killed to be presented in writing in sixty days to the president, treasurer, superintendent, or some depot agent of the corporation.—*S. C.* 391
9. *Charter of railroad company creates a contract.*—The charter of a railroad company is a contract which is protected by clause 1, section 10, of article 1, of the constitution of the United States, unless the charter is by its terms repealable.—*Ala. & Fla. Railroad Co. v. Burkett.* 569
10. *Same; how can not be impaired.*—A State can not impair the obligation and privileges secured by such a charter, either by its constitution or its laws. The prohibition is on the State by whatever means it acts.—*S. C.* 569
11. *Same; what not affected by.*—The twenty-fifth section of the first article, and the fifth section of the thirteenth article of the present constitution of the State do not operate upon railroad charters granted by the State before the adoption of the present constitution, unless such charters were made repealable when granted.—*S. C.*... 569
12. *An act of congress of August 4, 1852; when ceases to operate as a grant of the right of way.*—The act of congress of August 4, 1852, which grants to railroad companies the right of way over the public lands in the States where such lands lie, ceases to operate on said lands after they have been entered and purchased by the citizen; unless the railroad company, claiming such right of way, has located its roadway and filed a plat of the location of the same with commissioner of the general land office of the United States at Washington, in the manner required by said act of congress, before said entry is made.—*S. C.* 569
13. *Alabama & Florida Railroad Company, 5th section of charter of; how requires damages to be assessed.*—The 5th section of the act to amend the charter of the Alabama & Florida Railroad Company, directs how the damages shall be assessed for lands condemned for the use of said company, and this section requires the jury making such assessment to take into consideration the probable advantages the owner of the lands condemned may derive from the construction of the road, in increasing the value of his lands.—Acts 1853-4, p. 258, § 5. The principles enunciated in the 3d and 4th head-notes of Alabama & Florida Railroad Company v. Burkett, (42 Ala. p. 83,) modified.—*S. C.* 569
14. *Same; what consideration can not enter into the assessment of damages.*—But in making such assessment the jury can not take into consideration the possible damages that may arise from the killing of stock by the cars on said railroad, or the possible necessity of an increase in the quantity of fencing on said land. Such damages would be too remote, as they might never occur.—*S. C.* 469
15. *Act to loan three per cent. fund, &c.; is still of force.*—The act of the general assembly of this State, entitled, "An act to loan and appropriate the three per cent. fund and its interest," approved, February 18, 1860, is a constitutional law.—Pamph. Acts, 1859, 1860, p. 54, Act No. 68—*Ex parte Selma & Gulf Railroad.* 423
16. *Three per cent. fund; is a trust fund.*—The "three per cent.

RAILROADS—CONTINUED

- fund" does not belong to the State. It is given by the congress of the union to the State, in trust for the purposes named in the gift ; that is, for the purpose of making " public roads, canals, and improving the navigation of rivers," in this State.—Act of Congress, March 2, 1819, Clay's Digest, pp. xxii, xlv.—*S. C.*..... 423
17. *Same*.—The act of February 18, 1860, above referred to, grants a *loan* and *appropriation* of the sum of forty thousand dollars to the Selma & Gulf Railroad Company, and to which said company is entitled upon complying with the requirements of said act.—*S. C.* 423
18. *Same ; what does not forfeit right of company to apply for loan of*. When it appears that any of the railroad companies, to which *loans* and *appropriations* of said " three per cent. fund" are granted by the second section of said act, applied for the same within six months after the passage of said act, and in the manner prescribed therein, and that such *loan* and *appropriation* was postponed by the governor, a subsequent application may be made in renewal and continuation of the first application, which was so postponed. Such postponement does not forfeit the right to the *loan* and *appropriation* granted under the act.—*S. C.*..... 423
19. *Same ; application for, to whom may be made*.—And an application so made in renewal and continuation of such first application, made within the six months after the passage of said act, and postponed, does not come too late, if made to the governor of this State, elected and inducted into office under the present constitution of this State.—*S. C.* 423
20. *Same ; action of governor in respect to ; when will not be controlled by court*.—The duties devolved on the governor by the act of February 18, 1860, " to loan and appropriate the three per cent. fund," are to be performed by him, under the law, in his own way. The performance of his duties is not to be controlled by this court or any other, when he acts under authority of law. Of such things he is the sole judge, in the executive branch of the State government.—*S. C.*..... 423
21. *Same ; warrant given in payment of loan of ; when only treasurer can refuse payment of*.—Upon the issuance or drawing of the " warrants," as authorized by said act, to the party entitled to the same, unless there is fraud, the warrants so issued or drawn give a right to the company in whose favor they are drawn, to the amounts therein named, upon the treasury of the State, which, upon proper application, the treasurer can not refuse to pay, unless there is a deficiency of funds in the treasury for that purpose. Such right will be enforced by *mandamus*.—*S. C.*..... 423
22. *Proposal of railroad company to commissioners court ; may be made to a special term*.—A proposal of a railroad company, under the act entitled, " An act to authorize the several counties and towns, and cities, of the State of Alabama, to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their respective interests," approved 31st December, 1868, if it conform to the provisions of said act, may be made to a special term of a court of county commissioners,

RAILROADS—CONTINUED.

and such proposal will give said court jurisdiction to make an order to submit said proposal to the qualified electors of said county for their acceptance or rejection ; and an election duly held under such order, if it result in favor of subscription, will authorize said court to subscribe, on behalf of such county, to the capital stock of said railroad company, and to issue the bonds of such county in payment of the same.—*S. C.*..... 230'

23. *When mandamus will be granted to compel subscription to railroad.*—If the commissioners court, after an election, duly held, under the act of December 31, 1868, authorizing counties to subscribe for stock in railroads, refuses to subscribe for the amount of stock named in such proposal, and issue the bonds of the county in payment of the same, it may be compelled to do so by *mandamus* ; but if said proposal contains another proposition in addition, as to build a passenger and wagon bridge across a river running through said county, free of toll to all the people of the State, such proposal, containing such an additional proposition, will confer on said court no jurisdiction to submit such proposal to the qualified electors of the county for their acceptance or rejection ; and an order of said court, and an election held under it, will be invalid, and will give to said court no authority to subscribe to the capital stock of said railroad company, and issue the bonds of the said county in payment of the same.—*Ex parte Selma and Gulf Railroad Co* 230
24. *Same.*—An application for a *mandamus*, in such a case, to compel a court of county commissioners to subscribe to the capital stock of a railroad company, and pay for the same in the bonds of the county, will be denied.—*S. C.*..... 230

SECURITY FOR COSTS.

See COSTS.

SET OFF.

1. *Set off.*—Where a person conveyed land to another in consideration of the payment by the latter of his indebtedness to a third person, and it was afterwards ascertained that the debt had been previously paid, in a suit by the party making the payment to recover it as money paid by mistake, the defendant may make available a set off against the party for whose benefit it was paid, though not a party to the record.—*Moody v. Robertson*..... 432

SHERIFF.

1. *Sheriff's sale, &c.; when will not be set aside.*—A sale under a writ of *feri facias* by the sheriff will not be set aside on the motion of a person not a party to the judgment or interested in it, when it appears that the execution has been regularly issued, and there is no mistake or fraud, or gross inadequacy of price bid at the sale, which is prejudicial to the party making the motion.—*Shaw v. Lindsay*..... 290

SHERIFF—CONTINUED.

2. *Sale under Confederate judgment.*—A sale of the defendant's lands, under a judgment rendered during the late war, will not be set aside on the motion of a stranger, who has no interest in the judgment, but claims such lands by a title derived from a defendant in such judgment, acquired in 1866 by a purchase independent of the judgment. Such a sale does not necessarily prejudice the rights of such a claimant.—*S. C.*..... 290

STATUTES.

1. *When construed together.*—The statute upon the removal of executors and administrators is *pari materia*, and must be construed together as one law.—*Crawford v. Tyson*..... 299
2. *Same.*—The sections of the Revised Code upon railroads are to be construed as one law, and taken together as a whole.—*Mobile and Ohio Railroad Co. v. Malone*..... 391
3. *Effect of repeal.*—A statute, when repealed, must be considered, except as to transactions which are passed and closed, as if it never existed.—*Alabama Medical College v. Muldon & Sons*..... 603

SURETIES.

1. *On administration bond ; what liability of, not discharged by.*—The liability of a surety on an administrator's bond is not discharged by his death, although the default occurred afterwards.—*Hightower v. Moore*..... 387
2. *On guardian's bond.*—The liability of the surety of a guardian is a contingent liability provable under section 19 of the bankrupt law of 1867. It is not of a fiduciary character, from which the discharge in bankruptcy of the surety does not release.—*Jones & Culom v. Knox*..... 53
3. *Note already delivered, signing of as surety ; when imposes no obligation on surety.*—The signing of her husband's note, previously made and delivered by him, by a wife, as his surety, does not impose on her any obligation which will sustain its subsequent recognition.—*Hetherington v. Hixon*..... 297
4. *Same.*—Where a widow gave her note, secured by mortgage, for the payment of her deceased husband's debt, at the instance of the promisee, the mere fact that the notes were given up to her is not proof of a valid consideration. It must be shown that obtaining the notes, as something of value, entered into the inducement to her agreement.—*S. C.*..... 299
5. *Same.*—In such a case, loss subsequently sustained on account of a failure to file the notes as claims against his insolvent estate, can not create a consideration, although the non-claim was in consequence of the creditor's belief that he had otherwise secured their payment.—*S. C.*..... 297

TAXES.

1. *City license tax of Mobile, who liable to pay.*—A party who carries on business in the lower bay of Mobile, some thirty miles below the city, and outside of the corporate limits of the city, but whose residence is in the city, and who keeps the capital employed in his business there, is not liable to pay a city license tax.—*Bates v. Mayor and Aldermen of Mobile*..... 158
2. *Tax for benefit of medical college at Mobile.*—The annual payment of \$200 to the medical college of Alabama, at Mobile, imposed by section 1186 of the Revised Code on all insurance companies not incorporated by this State, and doing business in the city or county of Mobile, was in the nature of an impost or tribute. The college acquired no vested right to it, because no consideration moved from the college.—*Ala. Medical College v. Muldon & Sons*..... 603
3. *Same; force and effect of act repealing, on suits brought afterwards.*—The college can not maintain an action commenced after the repeal of the law requiring such payment, to recover the amount due up to the time of the repeal. A statute, when repealed, must be considered, except as to transactions which are passed and closed, as if it never existed.—*S. C.*..... 603
4. *Certiorari, when will not be granted.*—A certiorari will not be granted at the instance of an individual tax-payer, in his name, to revise the proceedings of the court of county commissioners appointing an agent "for the issuing of the rations to the indigent persons of the county," and ordering his payment out of the county treasury.—*Benton v. Taylor*..... 388

TENANTS IN COMMON.

See PARTITION.

THREE PER CENT. FUND.

See RAILROADS.

TROVER.

1. *When action lies, for cotton sold for Confederate money.*—Although Confederate treasury-notes can not be considered a sufficient consideration to support a contract for the sale of property; yet where cotton was sold during the late war for which payment in such currency was accepted, if the vendor ceased to hold the cotton as owner and became the bailee of the purchaser, the latter may maintain trover against him, if he converts it.—*Block v. McNeil*. 288
2. *When action lies by wife's trustee.*—A bona fide conveyance by the husband to a trustee for the use of his wife, of property purchased by him chiefly with funds of his wife, received from her guardian, the title to which he took in his own name, made in consideration of such funds so received and appropriated by him, confers on the trustee such an interest in the property as will enable him to maintain trover for its conversion.—*Ryan v. Bibb*..... 323

TROVER—CONTINUED.

3. *For conversion of property exempt from administration.*—The property of a decedent exempted from administration by section 2061, Revised Code, may be sold by the administrator for the benefit of the family, if not needed for their use. But if he sell it without the consent of the family, he is liable for its conversion.—*Barwick v. Rackley* 402
4. *Same ; when guardian liable for conversion of.*—The guardian of an infant member of the family is liable for a conversion, if he sells the child's interest in the property. *Secus*, if the child be withdrawn from the family.—*S. C.*..... 402
5. *Conversion of promissory note ; measure of damages.*—In trover for a promissory note, the measure of damages is, *prima facie*, the value on its face. But the insolvency of the parties liable thereon may be shown in mitigation of damages.—*McPeters v. Phillips*... 496

TRUSTS.

1. *Purchaser ; when chargeable with notice of trust.*—A purchaser of land from a vendor who claims it as his own, but who has no legal title except as trustee for another, is chargeable with the trust *Dudley v. Witter* 664
2. *Order of court authorizing trustee to sell land ; to what sale can not be referred.*—A sale of land as his own, by a vendor who is in possession as trustee of another, can not be referred to an order of court authorizing him to sell, as trustee, made several years before, when it was not so intended by him and the purchaser.—*S. C.* . . . 664
3. *Purchaser, charged with constructive notice of trust ; when should not be considered as trustee in invitum.*—A purchaser charged with constructive notice only of a trust, should not be held a trustee *in invitum*, when a mere want of caution, as distinguished from fraudulent and willful blindness, is all that can be imputed to him.—*S. C.* 664

VENDOR AND PURCHASER.

1. *Sale of an article, when complete.*—The sale of a specified article for money, when the money is paid is complete, and transfers the title to the purchaser without a delivery, either actual or constructive.—*Darnell v. Griffin*..... 520
2. *Sale, non-performance of condition ; what does not excuse.*—If by the terms of a sale the property in the thing sold is to pass to the vendee upon his deposit of the purchase-money at a particular bank, the refusal of the bank to receive it will not excuse the non-performance of the condition.—*Thompson v. Ray*..... 224
3. *Warranty of soundness of horse ; what evidence inadmissible to prove breach of.*—What a plaintiff said to his partner and co-plaintiff about defendant's warranting a horse to be sound, in the absence of defendant, and after the sale, is not evidence to prove a warranty of soundness in an action for a breach of such warranty. *Smith v. Flagg*..... 624

VENDOR AND PURCHASER—CONTINUED.

4. *Vendor's lien; when exists; how may be enforced.*—L., the vendee, being indebted to H., the vendor, for the purchase-money of land, the indebtedness constituting a vendor's lien thereon, L., at the request of H., gave his promissory note to S., a creditor of H., for the amount due by H., and received a corresponding credit from H. for the amount of the note given S., all the parties agreeing at the time that the note thus given to S. should carry with it a vendor's lien to the amount of the note,—*Held*, that S. might enforce a vendor's lien on the land by bill in equity against L., and that H. was a proper party defendant to the bill.—*Latham v. Staples*. 462
5. *Same; when the same bill may join one defendant to have a deed reformed and with another against whom vendor's lien is sought to be enforced*—If A buy lands of B, and pay for them, and receive B's deed for the same, in which, by the inadvertence and mistake of B, the lands are misdescribed, and after A's purchase, and before the mistake is discovered, A sells the same lands to C, the brother of B, who pays half of the purchase-money and gives his promissory note for the remainder, and takes A's bond for title; if, after the mistake is discovered, B refuses to correct the mistake, and he and C combine and confederate together to prevent the correction of the mistake, and, also, to avoid the payment of the remainder of the purchase-money, on the part of C, A may join both in a bill to correct the mistake, and to set up and enforce his lien on the lands for the unpaid purchase-money.—*Hudspeth v. Thomason*. . . . 470
6. *Act of October 10, 1868, "for the protection of bona fide purchasers for valuable consideration," construed.*—The act of the general assembly "for the protection of bona fide purchasers for valuable consideration," is not a mere registration act for the protection of innocent purchasers without notice, but it is a law regulating the liens of judgments by prescribing the conditions upon which they shall be created and preserved.—*Thornton v. Bledsoe*. 73
7. *Purchaser at judicial sale; when liable for interest on arrears of interest.*—Where, in execution of an ante-nuptial agreement that the wife should have one-third of all the real and personal property her husband should die seized and possessed of, during her life or widowhood, in lieu of her dower and distributive share, the chancery court, with the consent of the widow, decreed a sale of the lands of the deceased husband, free from any claim of the widow, and prescribed as a part of the terms of sale that one-third of the price should be payable on the termination of her life or widowhood, but the interest thereon should be annually paid to her,—*Held*, that the purchaser was liable to her for interest on the arrears of interest.—*Turrentine v. Perkins*. 631
8. *Purchaser; when chargeable with notice of trust.*—A purchaser of land from a vendor who claims it as his own, but who has no legal title except as trustee for another, is chargeable with notice of the trust.—*Dudley v. Witter*. 664
9. *Same.*—A purchaser, charged with constructive notice only of a trust, should not be held a trustee *in invitum*, when a mere want of

VENDOR AND PURCHASER—CONTINUED.

- caution, as distinguished from fraudulent and willful blindness, is all that can be imputed to him.—*S. C.*..... 664
10. *Order of court authorizing trustee to sell land ; to what sale can not be referred.*—A sale of land as his own, by a vendor who is in possession as trustee of another, can not be referred to an order of court authorizing him to sell, as trustee, made several years before, when it was not so intended by him and the purchaser.—*S. C.*... 664
11. *Sale of decedent's land, under probate decree, in 1863 ; when set aside.*—A sale of a decedent's lands, in 1863, under an order of the probate court, may be vacated and set aside on motion, founded on the petition of the parties complaining, who are distributees of said estate, made in the court of probate wherein the record of the first order and sale are found, if it appear that such sale has never been confirmed, and the purchaser at such sale has failed to give the security for the purchase-money required by law, and is dead at the date of said motion.—*McSwean v. Faulks*..... 610
12. *Subsequent purchaser, what notice charged with.*—A subsequent purchaser who has bought such land from the vendee at such sale, can not claim to occupy the position of an innocent purchaser for valuable consideration without notice. He must be visited with notice of all the facts which his vendor's title would disclose.
S. C...... 610

WILLS.

1. *Republication.*—In this State, the republication of a will is the making of a new will, and such republication must be made with all the formalities required by law.—*Barker v. Bell*..... 216
2. *Same.*—A will with the name of the maker and the names of all the subscribing witnesses save one torn off, can not be republished without a new signing and attestation, as required by the statute in the case of making a new will, where it appears that the cancellation was committed by the testator himself with the intention to cancel the will ; and this, although after such cancellation, the testator may have spoken of such canceled will as "his will."—*S. C.*..... 216

WITNESS.

1. *Section 2704 of Revised Code ; exceptions in, to what applies.*—The exception to the general rule of the competency of witnesses, notwithstanding their interest in the suit or being parties to it, as enacted in section 2704 of the Revised Code, applies to transactions with, or statements by, a deceased executor or administrator, in suits by or against his successors in the administration.—*Waldman v. Crommelin*..... 580
2. *Recalling rests in discretion of court.*—It rests in the sound discretion of the court to allow a witness to be recalled. Where a witness is recalled against the objection of the party summoning him, after he had dismissed him, such witness is the witness of the party

WITNESS—CONTINUED.

- so calling him back, and can not be impeached by such party.
Barker v. Bell 216
3. *What question can not be compelled to answer.*—A female witness, for the prosecution in a criminal case, may be asked on cross-examination if she is unmarried, and she may be compelled to answer. But she can not be compelled to answer a question the response to which involves her in the confession of a crime.—*Boles v. The State*..... 204
4. *Same; ill fame of witness, founded on what, not sufficient to impeach.*—A female witness in a criminal case may be asked on cross-examination, whether she is not a person of such “ill fame as to exclude her from society,” but the court should not compel her to answer, unless it appears that the cause of her “ill fame” would be a proper reason to impeach her veracity as a witness. If her exclusion is founded on a prejudice against her religious creed, her mode of dress, her political sentiments or nativity and the like, it should not be allowed to discredit her.—*S. C.*..... 204

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